U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Date: April 11, 2000

Case No.: 1999-CAA-13

In the Matter of:

BRUCE DAVID MOURFIELD II,
Complainant

against

FREDERICK PLAAS & PLAAS, INCORPORATED,
Respondents

APPEARANCES:

EDWARD A. SLAVIN, JR., ESQ.
On behalf of the Complainant

ALEC J. BECK, ESQ.
On behalf of the Respondents

BEFORE: RICHARD D. MILLS
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a "whistleblower" complaint, alleging that Respondents discriminated against Complainant in violation of the employee protection provisions of a number of different federal environmental and pollution control statutes.[1]

[1] These include: Clean Air Act (CAA), 42 U.S.C. § 7622; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9610; Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i); Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971; and Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622.

SUMMARY OF PROCEDURAL HISTORY

After Mr. Mourfield was laid off by Respondents (as described below), he filed an OSHA Section 11(c) discrimination complaint on December 28, 1998. On January 22, 1999, Mr. Mourfield also filed a complaint under various federal environmental whistleblower statutes. After an investigation by the Dallas OSHA office,[2] Mr. Mourfield's environmental whistleblower complaint was dismissed March 22, 1999, and his OSHA 11(c) complaint was dismissed March 24, 1999. On March 27, 1999. Mr. Mourfield requested a *de novo* hearing before this office on his environmental whistleblower complaints. A Notice of Hearing and Pre-Hearing Order were issued April 1, 1999.

In his request for *de novo* hearing, Mr. Mourfield requested that his complaint be remanded to OSHA for a "proper investigation"; this motion was denied May 18, 1999. During April and May, the parties also engaged in what is best described as a "war" of motions, mostly related to various discovery matters. The court decided many of these disputes in an "Order on Discovery" dated May 19, 1999. The parties also filed motions for Summary Decision on several key issues; in an Order dated June 1, 1999, the court found for Mr. Mourfield on most issues, including: that Mr. Mourfield had engaged in "protected activity" on December 16, 1998, and that Respondents had knowledge of this activity on that date.

The first hearing opened June 2, 1999 in Amarillo, Texas, and continued through June 4, 1999. On the final day of the hearing, Respondents orally requested reconsideration of the Summary Decision, and the court agreed to entertain the motion. Several evidentiary issues were also raised during the hearing, particularly Mr. Mourfield's request to review original documents underlying several of Respondents' exhibits. Respondents agreed to produce these documents shortly after the hearing.

After receiving briefs on reconsideration of the Summary Decision, the court agreed with Respondents that the finding that Mr. Mourfield had engaged in "protected activity" (based on the evidence in the record at that time) was in error, and reversed in an Order dated August 12, 1999.[3] Since "protected activity" had not been at issue in the first hearing, the court set a second hearing in Amarillo, Texas for September 20, 1999. Meanwhile, the production of the original documents

and Mr. Mourfield's requests for further discovery generated yet another "war" of motions. These

---

[2] Mr. Mourfield also complained that the investigation performed by the Dallas Regional OSHA office was inadequate. (See, e.g., Complainant's April 16, 1999 Amended Complaint, items 29 and 30).

[3] In its Order Granting Respondents' Motion for Reconsideration, the court only reversed its finding of protected activity, and did not address Respondents' knowledge of any protected activity. However, by vacating the finding of protected activity, the court also impliedly vacated its finding of awareness of protected activity.

various motions, as well as several evidentiary matters raised at the second hearing, were decided by the court in an Order dated April 5, 2000.

APPLICABLE LAW

First, this court has no jurisdiction over claims of discrimination under OSHA or the Labor Management Relations Act (for discrimination against union members)[4]; therefore, this decision is limited to the question of whether Mr. Mourfield qualifies as an environmental whistleblower, and whether he was unlawfully discriminated against as a result.

Although Mr. Mourfield alleged he was discriminated against in violation of the provisions of several different environmental statutes, the provisions of these statutes are all similar.[5] In sum, they prohibit discharging or discriminating against an employee for testifying, providing information, or causing the commencement of an action to enforce these environmental laws.

Numerous cases have defined the elements of a whistleblower's *prima facie* case. Generally a complainant must demonstrate: (1) that he engaged in "protected activity" under the statute; (2) that he was then subject to some adverse employment action; (3) that the respondent was aware of the protected activity when the adverse action was taken; and (4) raise an inference that the protected activity was the likely reason for the adverse action. See, e.g., Tyndall v. EPA, 93-CAA-6 and 95-CAA-5, slip op. at 3 (ARB June 14, 1996). One thing is clear: the affected employee must attempt to somehow make his concerns known, whether to supervisors, a government agency, or some other entity. It is not enough that the employee witness actual or potential violations of environmental law; he must make some effort to report or otherwise "blow the whistle" on the violations. An employee discharged for other reasons, legal or not, does not return himself under environmental whistleblower protection by alleging violations only after he has been discriminated against.

A respondent may then attempt to rebut the complainant's prima facie case by showing that the adverse action was motivated by a legitimate, non-discriminatory reason; if successful, the burden

---

[4] OSHA provides whistleblower protections similar to the environmental laws, but 29 U.S.C. § 660(c)(2) provides (in part) that if after investigation the Secretary feels a violation has occurred, he or she shall bring an action against the violator, and "In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief . . . ." The Labor Management Relations Act provides protection for workers against "unfair labor practices," including discrimination in the terms of employment as a result of union activity, but jurisdiction is vested in the National Labor Relations Board, and enforcement power in the federal district and circuit courts of appeals. (See 29 U.S.C. § 158(a); 29 U.S.C. § 160).

[5] The TSCA (15 U.S.C. § 2622(a)), SDWA (42 U.S.C. § 300j-9(i)), and CAA (42 U.S.C. § 7622(a)) are very similar, with only minor differences. Likewise, the provisions of CERCLA (42 U.S.C. § 9610(a)) and the SWDA (42 U.S.C. § 6971(a)) are nearly identical.

then returns to the complainant to demonstrate that the reason proffered is not the true reason. See, e.g., Scerbo v. Consolidated Edison Co. of New York, Inc., 89-CAA-2 slip op. at 2 (Sec'y Nov. 13, 1992).

SUMMARY OF THE EVIDENCE

I. Respondents and the "Bimbo Cereal site; Hiring of Mr. Mourfield

A. Mr. Frederick Plaas and Plaas, Inc.

Respondent Frederick Plaas owns and operates Respondent Plaas, Inc., an industrial mechanical contractor, which has been in business since approximately 1977. (TX, pp. 115-117, 220).[6] At the time of the first hearing in June, 1999, Mr. Plaas estimated he had ten job sites working in three or four states (TX, p. 787-88), and that while the number of employees varied, the total was less than "thousands of workers." (TX, p. 173). Mr. Plaas estimated Plaas, Inc. had total 1998 revenues of ten to eleven million dollars. (TX, p. 116, 223).

Mr. Kevin Heiskell, a Plaas, Inc. supervisor, described Mr. Plaas' management style as "great," and agreed that he was a "hands on" manager, but not a "control freak." (TX, p. 759-60). Mr. Plaas said he would agree with that characterization "somewhat," because he likes to keep in touch with his superintendents and make site visits. (TX, p. 786).

Mr. Plaas recalled that Plaas, Inc. had previously been fined $600.00 by OSHA. (TX, p. 215, 221). Mr. Plaas could not recall any other citations out of "hundreds of jobs," although he said there have probably been other site inspections. (TX, p. 221-222). Under questioning from Mr. Mourfield's counsel, Mr. Plaas recalled at least one other small OSHA fine. (TX, pp. 258-59). Mr. Plaas did not recall any employee ever being "maimed," "crippled," or killed on the job. (TX, p. 258, 268).

B. The Bimbo Cereal Contract

Plaas, Inc. was hired by Bimbo Cereal to perform welding work on a new construction project in Dawn, Texas. (TX, pp. 620-21). The original bid was for the installation of "process piping for all of the equipment that basically makes tortilla flour," and some of the piping for fire protection. (TX, p. 791). This was a "hard-money contract," meaning that Plaas, Inc. was paid a set amount of money to do a set amount of work; the more costs were kept down, the more profitable the contract. (TX, p. 800, 802). The work originally was scheduled to begin at the end of August 1998, and to

---

[6] References to the transcript and exhibits are as follows: Hearing Transcripts, June and September, 1999 (TX); Complainant's Exhibit (CX-__); Employer's Exhibit (EX-__). "EX" is used for Respondents's exhibits for convenience, as this is how the parties usually referenced the exhibits; however, they should more properly be listed as Respondents' Exhibits, or "RX."

finish by the end of December, 1998. (TX, p. 615, 621).

Mr. Kevin Heiskell was hired as the superintendent responsible for the Plaas, Inc. work on the Bimbo Cereal site, and he reported directly to Mr. Plaas. (TX, p. 615, 618-19, 763). Mr. Heiskell testified he has worked in construction for fifteen years as a pipefitter and welder, and although he has been in management for nine or ten years, he continues to perform pipefitting and welding as needed. (TX, p. 616-17). As of June 1999, Mr. Heiskell testified he had worked for Plaas, Inc. for approximately two years, on various sites.[7] (TX, p. 132, 616). Mr. Heiskell testified he was on the job site every work day from August through December 1998, and that as the Plaas, Inc. site superintendent, safety and health were his main concerns. (TX, p. 617, 619, 723). Mr. Heiskell said he was also responsible for training in different areas, such as HAZCOM and confined space work, as well as certain other areas he said were not at issue for this job site. (TX, p. 629-30). Mr. Heiskell hired all of the other Plaas, Inc. employees at the Bimbo Cereal site, and could hire and fire without prior permission of Plaas, Inc. headquarters. (TX, p. 618). Mr. Rodger Rogers was brought in as foreman, although the two men had never worked together before. (TX, p. 628).

Mr. Rodger Rogers reported to Mr. Heiskell, and had direct supervision of as many as ten men. (TX, pp. 395, 496-98, 501). As of the June 1999 hearing, Mr. Rogers had worked for Plaas, Inc. for four years, "off and on." (TX, p. 129). His duties were to watch the crews, keep them "lined out," and to make the work go as smoothly as possible. (TX, p. 498). Mr. Rogers is an experienced plumber, but he had never done any welding; however, as foreman, he supervised both welders and pipefitters. (TX, p. 498, 501). Mr. Rogers agreed that all hiring and firing was done either by Mr. Heiskell or Mr. Plaas; Mr. Rogers could not fire anyone directly,[8] but could bring the matter to Mr. Heiskell, who did have the authority to fire employees. (TX, p. 499-500).

The start of the project was delayed somewhat, but the work caught up during the ensuing months. (TX, p. 621). However, Plaas, Inc. quickly realized that the contract would not be as profitable as originally expected due to delays caused by poorly drafted plans. (TX, p. 804-05). On November 12, 1998, Respondents won a bid for further work at the Bimbo site (TX, p. 586); Plaas, Inc. has performed other work as well, including repair and modification work. (TX, p. 793-94).

C. Mr. Mourfield

Mr. Mourfield was 27 years old at the time of the first hearing, and had begun welding at age

---

[7] Mr. Plaas said he thought Mr. Heiskell was "a good superintendent, a very fine individual . . . intelligent in the field that he has been instructed to do for me." (TX, p. 865).

[8] Mr. Mourfield testified that he understood both Mr. Heiskell and Mr. Rogers to be in charge, as both could hire, fire, and reprimand workers. (TX, p. 395). Mr. Dennis Smith, another Plaas, Inc. employee, also testified that Mr. Heiskell had told the men that Mr. Rogers could hire and fire. (TX, p. 47).

7 or 8. (TX, p. 277). Mr. Mourfield had previously worked as a police officer for several years, but returned to welding approximately four and a half years ago. (TX, p. 277-78). He testified that he holds several types of welding certifications[9] from the Department of Energy, the Tennessee Valley Authority, and other contractors, and that he has received training in welding safety. (TX, p. 277, 280). Mr. Mourfield was tendered and accepted by the court as an expert in welding based on his training and experience, although the court agreed it would consider Mr. Mourfield's status as a party when evaluating his testimony in this area. (TX, p. 286-87).

Mr. Mourfield was hired by Mr. Heiskell November 10, 1998, as a welder/ pipefitter. (TX, p. 289, 500, 552, 622, 627). He was not given a welding test before being hired; because the job site was small, the supervisors examined the first few welds performed by a new employee in order to judge his skills. (TX, p. 138, 560, 622, 740-41). Mr. Mourfield also signed an application acknowledging that his employment was "at-will" (TX, p. 378-380; EX-50); however Mr. Mourfield admitted at the hearing that this application was incomplete or untruthful because he had not listed all previous jobs.[10] (TX, p. 374-75). Mr. Heiskell said new hires also completed a "handbook application," which contained information on benefits, etc., and were given a job site handbook. (TX, p. 628-29). Mr. Heiskell said he also went through any safety items the general contractor specified. (TX, p. 629). Mr. Rogers was Mr. Mourfield's foreman, and he said that initially he and Mr. Mourfield got along well. (TX, p. 501).

Mr. Mourfield alleges Mr. Rogers told him he could stay with Plaas, Inc. until the original Bimbo Cereal contract was finished, and that there would be additional work on new contracts with Bimbo Cereal. (TX, p. 366, 373, 380-81). Mr. Mourfield said he also understood that he had a good chance at long-term employment with Plaas, Inc., and could move to other Plaas, Inc. jobs in other states.[11] (TX, p. 370-71; 380). However, Mr. Rogers denied promising anyone they could remain through the entire contract with Bimbo Cereal, or that he had promised Mr. Mourfield long term employment with Plaas, Inc. (TX, p. 538, 543). Mr. Rogers explained it is impossible to make such a promise due to the unpredictable nature of construction work.[12] (TX, p. 539). Mr. Plaas was not aware that Mr. Mourfield was allegedly told this, and agreed that it is impossible to assure workers of steady work due to possible weather or equipment delays, delays caused by other contractors, etc.

---

[9] Mr. Plaas was unaware of any certifications Mr. Mourfield might hold (TX, p. 139), and Mr. Heiskell said he had not actually seen Mr. Mourfield's certifications. (TX, p. 740).

[10] Mr. Mourfield explained he was afraid that a non-union contractor would not hire him if he listed previous work primarily for union contractors or on union jobs. (TX, p. 376).

[11] Mr. Mourfield says Mr. Rogers told him that Plaas, Inc. will "cull" out bad workers, but will keep good workers with the company and move them from job to job. (TX, p. 373).

[12] Mr. Rogers said that since 1987, he has been laid off several times himself, and has laid others off several times. (TX, p. 607-08). Mr. Heiskell also agreed that layoffs are common in the construction industry. (TX, p. 626).

(TX, pp. 158-59, 233-34). Mr. Plaas admitted that some workers are kept on full time and moved from job to job, but his foremen would "not really" have the authority to make such a deal. (TX, p. 226, 234).

Mr. Rogers and Mr. Heiskell were apparently satisfied with the quality and quantity of Mr. Mourfield's work. (TX, p. 501, 591, 649). Mr. Rogers said he told Mr. Mourfield he was doing a good job, and was a good worker. (TX, p. 591). Mr. Heiskell disagreed that Mr. Mourfield was "the best" welder on the site, and said he "had a lot of good welders." (TX, pp. 763-64). Mr. Plaas also refused to say Mr. Mourfield was "a very good welder," only allowing that he was an "okay welder," who must have met company standards to stay on the job (TX, p. 137); later Mr. Plaas allowed that Mr. Mourfield was a "good welder," who "met our standards." (TX, p. 139; see also, TX, pp. 223-224). Mr. Mourfield said he was told he held the job record of 37 stainless steel welds in one day, while other welders averaged only 15 welds per day. (TX, p. 347-48). However, Mr. Rogers testified was not aware of any record for welds per day. (TX, p. 553). Mr. Plaas also testified there was no firm quota of welds per day, and that he had never inquired into Mr. Mourfield's productivity. (TX, pp. 122-23).

D. Planned Reductions in Force

As superintendent, Mr. Heiskell was primarily responsible for layoffs of Plaas, Inc. employees on the Bimbo Cereal site, but he sometimes would discuss lay-offs with Mr. Plaas. (TX, p. 633). Mr. Heiskell said it is important to keep only an appropriate number of workers on the payroll to avoid wasting company money.[13] (TX, p. 633, 639). Mr. Heiskell and Mr. Plaas both explained that staffing requirements are determined by estimating when equipment will arrive for installation, coordinating with other contractors, and evaluating overall workload. (TX, p. 623, 627, 633, 802). Mr. Heiskell agreed this is an "inexact science." (TX, p. 627).

The project began in earnest in September, so Mr. Heiskell said he did most of the hiring in September and October of 1998. (TX, p. 624-25). However, a few men were laid off in September and October, specifically Mr. Eppler and Mr. Dodderer, because it was decided at that time to reduce the work force from twelve to ten men. (TX, p. 625-26).

Mr. Heiskell and Mr. Plaas both testified they discussed additional lay offs well before the OSHA visit of December 16, 1998. (TX, p. 757; p. 855, 1028). During a November 1998 site visit,[14]

[13] Mr. Plaas agreed that a job superintendent normally will make layoffs to reduce costs as a job winds down. (TX, p. 158).

[14] Mr. Plaas testified he visited the site at least twice, in August and November 1998 (the week before Thanksgiving). (TX, p. 119). Mr. Plaas said he met Mr. Mourfield during his

Mr. Plaas asked Mr. Heiskell when he would begin laying men off, because it should be time to do so, based on the original bid. (TX, p. 800-01, 804). Mr. Heiskell said that he expected to reduce staffing levels by four men (from the current eleven) in a few weeks. (TX, p. 634-35, 801). Mr. Heiskell said they decided to lay off one helper and three welders, because there were too many welders on the job at the time.[15] (TX, p. 636-37, 639). It was decided to lay off Mr. Shawn Clampet, Mr. Lloyd Pond, Mr. Travis Atkinson, and Mr. Mourfield.[16] (TX, p. 256, 815). Mr. Plaas said he did not decide who would be laid off, but Mr. Heiskell had informed him of the names. (TX, p. 817).

Mr. Heiskell, Mr. Rogers, and Mr. Plaas all testified that this lay off plan was not reduced to writing, and that lay off plans normally are not reduced to writing in the construction industry. (TX, pp. 640-642; p. 591, 607; p. 158, 805-06). Mr. Plaas said in all of his years of construction industry experience, he personally has seen only one written layoff plan. (TX, pp. 807-815). Mr. Heiskell could not specifically explain why he did not write down his layoff plan, but he said he has never put any lay off plan in writing. (TX, p. 641).

Mr. Heiskell insisted that he decided lay offs based on seniority, not skill. (TX, p. 705, 727, 731). Mr. Heiskell said he used a seniority system when he worked for Plaas, Inc. in Indiana, and again at the Bimbo Cereal site, explaining "that's just the proper way that I've done it, done business." (TX, p. 756, 764). Mr. Heiskell said he did not know of any instructions in the job site handbook or other written instructions regarding seniority-based layoffs. (TX, p. 705, 727; EX-47). Mr. Heiskell was also unable to name another company which makes layoffs on a strict seniority basis. (TX, p. 755-56). Mr. Heiskell said he used records of workers' hiring and firing dates to determine seniority; although he said he would consider time worked for Plaas, Inc. at other sites,

he did not know of any company "seniority list." (TX, p. 706-07). Mr. Plaas testified that he was aware of Mr. Heiskell's lay off methods, and although he "would not totally agree with it, at all times

---

November visit, but Mr. Mourfield did not complain of environmental hazards, did not report a hostile work environment or other problems, nor did he indicate he was a "union organizer," a "troublemaker," or that he intended to call OSHA. (TX, p. 803, 820, 1000-01).

[15] Mr. Heiskell had seven welders in November, but decided he would only need four in the coming months. (TX, p. 637). These seven welders were: Travis Atkinson, Barry Richmond, Dennis Smith, Shawn Clampet, Jay Dodderer, Scott Setser, and Mr. Mourfield. (TX, p. 637, EX-1). However, Mr. Setser quit soon after he was hired. (TX, p. 637-38).

[16] Mr. Plaas earlier testimony described only three men, Mr. Clampet, Mr. Pond, and Mr. Mourfield (TX, p. 256); later testimony added Mr. Atkinson to the list of layoffs. (TX, p. 817).

... it was the way that Kevin decided to do it."[17] (TX, p. 817-18). Mr. Plaas stated that seniority based layoffs are used "quite commonly," "probably at least 90 percent" of the time.[18] (TX, p. 818, 872).

Mr. Heiskell testified that when the decision to lay off was made, Mr. Mourfield was the junior (or newest) welder for Plaas, Inc. (TX, p. 638). Mr. Plaas testified that Mr. Mourfield, Mr. Clampet, and Mr. Pond were the most junior employees, and Mr. Atkinson had indicated he preferred another job that would hire his wife as well. (TX, p. 816). Mr. Plaas stated that productivity was not at issue in making these layoff decisions, as Mr. Mourfield and all of the other workers were good workers and welders. (TX, p. 223-225). Mr. Plaas testified the planned lay offs originally were scheduled for December 18, 1998, but when Mr. Clampet and Mr. Pond suddenly quit on December 17, it was decided to retain Mr. Mourfield for one more week. (TX, p. 859; see also *infra.*).

However, Mr. Mourfield's attorney pointed out using EX-59 that Mr. Eppler and Mr. Dodderer were hired before Mr. Mourfield, yet were laid off approximately November 22, some twelve days after he started work. (TX, p. 872-76). In addition, Mr. Dan Brown was hired on November 30, 1998 well after Mr. Mourfield, but was not laid off in December with Mr. Mourfield. (TX, p. 771). Mr. Plaas explained that Mr. Eppler was injured and chose to return home to see his own doctor, and therefore his seniority was not at issue. (TX, p. 902-03). Mr. Heiskell explained that Mr. Dodderer was hired as a helper, and tried at welder; however, his welding produced poor results, and he was eventually laid off after a month, even though Mr. Mourfield had been there less time.[19] (TX, p. 910-11, 913, 915). Mr. Heiskell then admitted that he had taken performance into account when making this lay off.[20] (TX, p. 915). Mr. Heiskell explained all of the other welders were equal in skill, and Mr. Dodderer wasn't really a welder yet. (TX, p. 916). Mr. Heiskell explained that Mr.

---

[17] Mr. Plaas said he would not lay off a worker with a needed specific skill just because he was the more recent hire. (TX, p. 818). Mr. Plaas also admitted that a worker who was doing poor work might have his skills considered in any decision to lay him off. (TX, p. 818).

[18] Mr. Don Green, a local union official, said in his experience, there have been only a few instances of companies laying off based on seniority. (TX, p. 922). Mr. Green is employed by Plumbers and Steamfitters Local Union 196. (TX, p. 905). Mr. Green has been in construction for 38 years, and has worked across the country. (TX, p. 920-21).

[19] Mr. Heiskell said EX-1 probably lists Mr. Dodderer as a welder because his initial welds looked good, so he began to receive welder's pay. (TX, p. 914).

[20] However, he denied he had been inaccurate when he testified previously that he always lays off by seniority, but he admitted he sometimes did take competence into account. (TX, p. 918). Mr. Heiskell said he would lay off a clearly incompetent person, even if they were senior to other workers. (TX, p. 918-19).

Brown was a fitter, and he denied Mr. Brown did any welding.[21] (TX, p. 770, 784).

II. Events of November 10th through December 16th

A. Union Activity

Mr. Mourfield denied he was trying to unionize Plaas, Inc. (TX, p. 438-39). Mr. Mourfield testified that he chose to work for Plaas, Inc. because: "my goal, as a health and safety director for Local Union 196 here, is to get the message across to union and non-union employees of companies all over this area that safety is number one, that it's up to them, it's up to the employee, because a lot of times the employer won't do the right thing as far as safety...." (TX, p. 1028). Mr. Mourfield went on to say: "that was our goal, to go out and just handbill .... explaining the employees' rights .... [and to tell them] you've got a right to work but to work safely, that's the main thing." (TX, p. 1029). Mr. Mourfield said he always discussed workers' rights at lunch, which was "off-the-company-clock time."[22] (TX, pp. 303-04). Mr. Mourfield also handed out various union stickers, buttons, etc., but said he was merely trying to inform everyone, including managers, of their rights under the law to be safe. (TX, p. 439-40).

Mr. Mourfield denied he had been in touch with Mr. Don Green[23] to generate support for a union, but said they were in contact at least by December 16, 1998. (TX, p. 440). Mr. Green attended the hearing with Mr. Mourfield and cooperated in his prosecution of the case. (TX, p. 906). Mr. Green also filed unfair labor charges on behalf of Mr. Mourfield against Plaas, Inc. (TX, p. 463, 906; see also EX-23 thru EX-26). At some point, a union election petition also was filed, but Mr. Mourfield did not recall when this was done. (TX, p. 440-41; see also CX-7). Mr. Plaas said this petition was filed in the "first week or two of December," after lay off plans had already been discussed with Mr. Heiskell in November, 1998. (TX, p. 819).

Mr. Mourfield testified that Mr. Rogers became upset with him when he arrived wearing union stickers on December 10, 1998. (TX, p. 396, 1053-54). Mr. Rogers approached and asked if he belonged to a union; Mr. Mourfield responded that the question was illegal. (TX, p. 396, 1055). Mr. Mourfield said Mr. Rogers "screamed at me ... and then clenched his fists," before turning and

---

[21] However, Mr. Mourfield testified that Mr. Brown did weld at the Bimbo Cereal plant, although the court notes Mr. Mourfield does not say he was a welder. (TX, p. 926).

[22] Mr. Smith testified that he was present when Mr. Mourfield spoke to the workers about their rights, and that management knew of this activity. (TX, p. 64).

[23] Mr. Don Green is an officer of Plumbers and Steamfitters Local Union 196. (TX, p. 905). Mr. Mourfield is not a member of this local, but is a "traveling member" of Local 102 of Knoxville, Tennessee. (TX, p. 905-06).

walking away.[24] (TX, p. 396, 1053-55). Mr. Mourfield said this was his first friction with Mr. Rogers. (TX, pp. 397-98). Mr. Mourfield felt Mr. Rogers was angry about his union efforts, but after the two got to know each other, he said Mr. Rogers did not seem to have a problem with him. (TX, p. 402).

Mr. Rogers said he did not become aware of Mr. Mourfield's pro-union stance or activities until lunch on December 12, 1998, when Mr. Mourfield was passing out union literature, stickers, calendars and magazines, and seeking signatures on authorization cards.[25] (TX, p. 510, 590). Mr. Rogers asked Mr. Mourfield what was going on, but he took no other action because lunch "was his free time to do that." (TX, p. 510). Mr. Rogers denied he was angry, and said Mr. Mourfield did not seem upset either. (TX, p. 511). Mr. Heiskell also said he was unaware of Mr. Mourfield's union activities until sometime in December, and said there was no friction between he and Mr. Mourfield over this, nor did he know of any friction with Mr. Rogers (other than the day of the OSHA visit, below), or of any problems with the other men over union activity. (TX, p. 657-58). Mr. Heiskell denied Mr. Mourfield was laid off because of his pro-union activities. (TX, p. 648).

Mr. Plaas said he was aware of Mr. Mourfield's pro-union activity only "very briefly," and did not know Mr. Mourfield was pro-union when he met him in November 1998. (TX, p. 819). However, Mr. Plaas testified that Mr. Mourfield's advocacy of the union did cause problems: several workers "didn't care to hear that," and Mr. Juan Campos had wanted to quit due to Mr. Mourfield's activities.[26] (TX, p. 183). Mr. Plaas denied telling Mr. Heiskell or Mr. Rogers he did not like Mr. Mourfield because he was a union organizer. (TX, p. 845). However, as the time for the planned layoffs neared, Mr. Plaas said he was reluctant to go ahead, admitting he did not wish to lay off a union organizer because "I figured I'd probably get an unfair labor practice suit or something." (TX, pp. 836-37).

B. Notes and Recordings of Events

---

[24] The court notes that at the second hearing in September, 1999, Mr. Mourfield did not mention Mr. Rogers screaming. (TX, p. 1055).

[25] Mr. Rogers said the only disruption Mr. Mourfield caused prior to December 16 was this passing out of flyers and information before work, at lunch, and after work. (TX, p. 592). Mr. Rogers also said the union was picketing at the gate of the Bimbo Cereal site December 12. (TX, p. 590).

[26] Mr. Plaas admitted he did not take notes of these problems. (TX, p. 184). Later he said notes on the circumstances of Mr. Clampet's quitting were made on his personnel file. (TX, p. 186).

Soon after starting work, Mr. Mourfield began taking notes and tape recording conversations. (TX, pp. 434-35). Mr. Mourfield denied the recorder was hidden, saying normally a portion of it protruded from his pocket and was visible; however, Mr. Mourfield admitted he had recorded some conversations without the permission of the other parties involved. (TX, p. 433-34, 436). Mr. Mourfield said some of his written notes of events were ruined by his children and thrown away, but he had retained most. (TX, p. 397, 401). These notes were never presented these notes to the court, and only three tapes were presented. (CX-6B, 11B, 12B).

Mr. Mourfield said he began taking notes after he felt an older worker, Mr. Eppler, was not treated fairly after being injured, so Mr. Mourfield started taking notes to see if he could help in some way. (TX, pp. 398-99, 401). Mr. Mourfield said he took notes frequently, though not every day. (TX, p. 401). He began recording conversations because "I foreseen [sic] a problem, and I wanted to make sure if anything happened, that I was covered." (TX, p. 437). Mr. Mourfield explained he foresaw safety problems, and wanted the tapes to be sure any dispute did not become one person's word against another's. (TX, p. 438).

Mr. Rogers also began taking notes in his calendar "to help protect us in a case of something like this." (TX, p. 541; see also EX-7, 40 (typewritten copies, EX-8, 39)). Mr. Rogers did not make as many notes on other men because he "never had no problems [sic] with any of the other hands," and Mr. Mourfield was "the talk of the job ... the center of attention." (TX, p. 578). Mr. Plaas indicated that he found portions of Mr. Rogers notes unclear, while others described conversations Mr. Plaas did not recall having. (See, e.g., TX, p. 835, 877, 892, 893-94). However, Mr. Plaas could point to only two specific examples of disagreement with Mr. Rogers notes[27] (TX, pp. 893-97), and he refused to characterize Mr. Rogers as a liar. (TX, p. 877). Mr. Heiskell also generally praised Mr. Rogers and his honesty, but expressed puzzlement at some of the events he recorded. (TX, 745-46). Even Mr. Mourfield indicated "there are some things here that I have no idea where he pulled them out of ... "and when asked if he thought the notes were not completely reliable, Mr. Mourfield replied "some of them."[28] (TX, p. 1045-47).

C. Mr. Mourfield's Request for Layoff

Two portions of Mr. Rogers' notes indicate that Mr. Mourfield wished to be laid off in

---

[27] Mr. Plaas disagreed that he had mentioned Mr. Mourfield's union status when asking Mr. Rogers to apologize for the events of December 16, 1998. (TX, p. 894). Mr. Plaas also disagreed that he had ever said to "to lay off [Mr. Mourfield] and on other. Insted of firen him." [errors in original] (TX, p. 897; EX-40, p. 3).

[28] For example, during an incident with Mr. Rogers on December 16, 1998 where Mr. Mourfield allegedly was fired, Mr. Rogers' notes indicate that Mr. Mourfield said he would "shut this fucking job down"; however, Mr. Mourfield specifically denied he said this. (TX, p. 1046).

January, 1999: notes from a page dated December 9, 1998 state "[Mr. Mourfield] wanted to be laid off before the 26th. He had to be at a court on January 22,"[29] (TX, p. 506; EX-7, p. 1, EX-8, p. 1); another page dated December 22, 1998 says "I ask[ed] [Mr. Mourfield] when was he wanting to go. He said 1-22-99. He is to be in court 1-26-99." (EX-7, p. 2).

Mr. Rogers testified that these notes were accurate: Mr. Mourfield had asked to be laid off by January 22, 1999 because of a pending court date in Tennessee on January 26 related to his prior work as a deputy sheriff. (TX, p. 508-09). Mr. Rogers testified that Mr. Mourfield said he "wanted" a lay off for his upcoming testimony in January, not that he "might need" to go to court at that time.[30] (TX, p. 570-71). Mr. Rogers wrote the request in his notes to remember it, and passed it along to Mr. Heiskell, as he would be the one to actually lay off any employee. (TX, p. 509). Mr. Rogers said it was not uncommon for workers to request lay offs for various reasons. (TX, p. 509). However, Mr. Mourfield denied he ever requested a lay-off or reduction of force from Mr. Rogers, and said that if Mr. Rogers says he did, then "he's lying." (TX, p. 381-82).

D. Doctor's Notes and Tardiness

Mr. Heiskell said Mr. Mourfield had problems with absenteeism and tardiness. (TX, p. 649). Mr. Rogers also said Mr. Mourfield had attendance problems, and that as foreman he spoke with him and wrote him up for tardiness and absenteeism on December 7, 1998. (TX, pp. 501-02, 715; EX-3). Mr. Rogers said Mr. Mourfield was not angry when he received the reprimand, but explained that "he had a sleep deprivation." (TX, p. 502, 554-55). Mr. Mourfield explained other absences or tardies were because his wife was in the hospital, his children were ill, or his truck had been broken into. (TX, pp. 554-55).

After Mr. Mourfield was late or absent several more times, Mr. Heiskell sent him to get a

[29] Mr. Rogers testimony on this point varied from the typed transcript of this page of notes (EX-8), and from what the court could decipher from the handwritten page (EX-7). However, in all the intent is clear: Mr. Rogers was reporting that Mr. Mourfield had requested a lay off around January 20, 1999.

[30] Mr. Rogers did not recall Mr. Mourfield saying he might not have to go, nor did he recall asking Mr. Mourfield if he would be able to return to work, but he agreed that Mr. Mourfield had said he would let him know later "for sure." (TX, p. 589).

doctor's excuse for any missed work days.[31] (TX, p. 650). Mr. Plaas explained that the request for a doctor's excuse resulted from the many absences in only a short time period. (TX, p. 840; see also EX-6). Mr. Rogers said employees were required to produce doctor's notes only if they missed several days in a row, but the only employee he can recall being asked to do so was Mr. Mourfield. (TX, p. 582-83). Mr. Rogers said he also had similar problems with Mr. Clampet, but he was only reprimanded verbally for tardiness. (TX, p. 610).

Mr. Heiskell eventually requested that Plaas, Inc. headquarters prepare a letter detailing Mr. Mourfield's multiple tardies and absences. (EX-6).[32] Using EX-6, Mr. Plaas said Mr. Mourfield was late or absent eleven times between November 10 and December 15, 1998. Mr. Plaas said if he were superintendent, he would have terminated Mr. Mourfield earlier because of tardiness and absences. (TX, p. 839). Mr. Plaas characterized this letter as a way to get an employee's attention, and said Mr. Mourfield was not late or absent again after the letter was sent. (TX, p. 839-40).

E. Allegations of Hostile Work Environment

Mr. Mourfield suggested in a December 16, 1998 conference call that he was afraid for his physical safety while on the job. (See CX-6A, p. 2 ("that kind of scares me, dropping that hood ...."). Mr. Mourfield testified that he had been physically assaulted "in excess of half-a-dozen times." (TX, p. 327, 442). For example, Mr. Mourfield said that while welding, he had been punched in the ribs or the back of the neck by "Joe," causing him to be "sore for a while." (TX, p. 327, 442, 452). Mr. Mourfield also testified he was once punched in the ribs by Joe "face to face," and was struck so hard it "knocked me back." (TX, p. 443, 447). Mr. Mourfield could not recall exactly when these incidents occurred, could not recall whether he had reported them to OSHA or the NLRB, and said he deliberately did not report this to his supervisors or to law enforcement officials.[33] (TX, p. 444, 448, 453). Mr. Mourfield agreed that physical attacks while welding were a safety issue, but said he

---

[31] This conversation was recorded on one of the tapes submitted to the court. (CX-11B). During this conversation, Mr. Mourfield suggested that the request for a doctor's excuse showed harassment and discrimination against a union worker, because others were not asked for doctor's excuses when absent. (See CX-11A, p. 1; CX-11B).

[32] This letter, dated December 15, 1998, was prepared by Plaas, Inc. headquarters because Mr. Heiskell did not have a computer or typewriter available to prepare it on site. (TX, p. 649). EX-6 is unsigned because a copy was sent to Mr. Heiskell in Texas for his signature and mailing. (TX, p. 842). When discovery requests were made, letters were either printed from computer files or pulled from other Plaas, Inc. files, since the signed copy already had been mailed out. (TX, p. 842-43). Mr. Plaas said both signed and unsigned copies of documents may be in the files, but he was unaware whether any signed copy of EX-6 existed. (TX, p. 843).

[33] As a former law enforcement officer, Mr. Mourfield agreed that this probably constituted an assault. (TX, p. 448).

didn't want to get anyone in trouble because he was there to help the workers, not "to put them in jail." (TX, p. 454).

Mr. Clampet and others allegedly threw things at Mr. Rogers several times, including small rocks. (TX, p. 328, 442). Mr. Mourfield also said Mr. Rogers, Mr. Clampet, and employees of Bimbo Cereal spread "propaganda" about him on December 10 and after, calling him a "union son of a bitch, union troublemaker." (TX, p. 444-46). Mr. Mourfield said he was also called a "safety freak" several times, although he admits he never heard Mr. Heiskell or Mr. Rogers refer to him that way. (TX, p. 450). Again, Mr. Mourfield did not report any of these incidents, and he was able to resolve his problem with Mr. Clampet. (TX, p. 454).

Mr. Mourfield's lunch also was destroyed once; it had been stored in the Plaas, Inc. trailer with the other men's lunches. (TX, pp. 328-29, 455, 593). Mr. Rogers said when he was told of this, he "didn't know what to say .... I couldn't believe somebody would do that." (TX, p. 593). Mr. Heiskell said he heard of the destruction of Mr. Mourfield's lunch, told the men in a meeting that they could be terminated for such activity, and he never heard anything else about this incident, nor of any other incidents of vandalism. (TX, p. 655). Mr. Mourfield suspected his lunch was destroyed by one of the Plaas, Inc. managers because the men were all in the field, and the managers were working inside the trailer where lunches were stored.(TX, p. 1053)

Mr. Mourfield testified he did not think these physical and verbal assaults were based solely on his union activity because his stated intent was to raise worker consciousness about a safe workplace. (TX, p. 449-50). Mr. Mourfield thought there was a "very good chance" that he was assaulted because of his safety concerns and advising his fellow employees of their rights. (TX, p. 451). Mr. Mourfield believes some of these incidents occurred because he was perceived as a safety freak, and was being called "union blah blah this and that" by some of the men. (TX, p. 455). In the second hearing, Mr. Mourfield maintained that his union activity and the perception of him as a "safety nut" led to the assaults. (TX, p. 1052-53).

However, not all of the alleged hostile environment came from the other workers; Mr. Mourfield cited the alleged hostility of Mr. Rogers on December 10, 1998 (when he wore union apparel) as an instance of hostility from management. (TX, p. 1053-54). Mr. Mourfield said he had no problems with Mr. Rogers prior to his arrival in union gear that day, except for a day Mr. Rogers thought Mr. Mourfield was wasting argon (see below). (TX, p. 1054).

Mr. Plaas testified he had heard no reports of a hostile working environment prior to Mr. Mourfield's claims in the conference call of December 16, 1998.[34] (TX, p. 198-99). Mr. Plaas also said he never heard any allegation that Mr. Mourfield had been punched. (TX, p. 204). Mr. Heiskell

[34] Mr. Plaas said he would expect his men to report any hostile work environment from Mr. Rogers or other workers to Mr. Heiskell. (TX, p. 200).

said Mr. Mourfield never reported any hostile work environment prior to December 16, nor was he aware of the allegations of physical violence. (TX, p. 654, 703). Mr. Rogers denied hearing any reports of a hostile work environment or physical assaults prior to December 16, 1998, other than of Mr. Mourfield's lunch being destroyed. (TX, p. 512, 593). However, Mr. Mourfield thinks Mr. Plaas knew of the hostile environment prior to December 16 because Mr. Rogers' notes describe a call from Mr. Plaas to Mr. Heiskell to "discuss the union."[35] (TX, p. 467).

Mr. Mourfield said he made notes of these incidents, some of which he still had, while others were accidentally destroyed by his children. (TX, p. 456). Mr. Mourfield also said he had cassette tapes evidencing the hostile work environment. (TX, p. 459). Mr. Mourfield told Mr. Plaas he would provide these notebooks and tapes "when I got time," but he never did provide them despite several requests to do so made during the conference call. (TX, p. 457-59). Mr. Mourfield told Mr. Plaas in the conference call that the information was "need-to-know," but said Mr. Plaas did not need to know. (TX, p. 459-60; CX-6A, p. 3). At the June hearing, Mr. Mourfield explained that in "big cases, where people have beaucoup of evidence . . . they protect that evidence." (TX, p. 461). Mr. Mourfield agreed that he was talking about big cases against employers, but denied that he was thinking he had a "big case" against Plaas, Inc., saying that as a former law enforcement officer, he simply knew it was important to preserve evidence. (TX, p. 461). Mr. Mourfield stored this evidence in his home, in his truck, and in the safe at Mr. Green's office. (TX, p. 466).

F. Training, HAZCOM, and MSDS

Mr. Heiskell testified he was responsible for training workers on various subjects as the need arose, including HAZCOM training.[36] (TX, p. 619-20, 629-30). Mr. Heiskell did some HAZCOM training using Plaas, Inc.'s training materials, but since Bimbo Cereal was a new facility, he chose to focus on general safety issues instead. (TX, p. 631-32). Mr. Heiskell said he was never asked by the other men for training on the hazards or materials they worked with. (TX, p. 741).

Mr. Heiskell held weekly "toolbox safety" meetings on Tuesday mornings,[37] each lasting

---

[35] Mr. Rogers testified Mr. Plaas never asked about Mr. Mourfield raising concerns of a hostile work environment prior to December 16, 1998. (TX, p. 594).

[36] Mr. Heiskell explained that HAZCOM training deals primarily with chemicals and acids, and personal protective equipment. (TX, p. 630).

[37] Mr. Rogers also testified a meeting was held every Tuesday morning. (TX, p. 530). However, Mr. Smith denied any "toolbox training meetings" occurred, except for the day before the OSHA visit of December 16, 1998. (TX, p. 65). Mr. Smith later testified that the men signed a document similar to CX-5F every Monday morning, although he could not remember the title; the pre-printed title of this is "Tool Box Safety Meeting Report." (TX, pp. 68-70; CX-5F). Mr. Smith then said planning and operational issues were usually discussed, and safety issues were only occasionally discussed. (TX, pp. 69-70, 71).

fifteen to twenty-five minutes. (TX, p. 620). Mr. Heiskell identified EX-35 as documentation of a "toolbox safety" meeting. (TX, p. 659). Based on this document, Mr. Heiskell discussed "housekeeping"[38] and HAZCOM from the Plaas, Inc. handbook on December 8, 1998. (TX, p. 659). This document also says "no hazards other than what we work with;"[39] Mr. Heiskell explained that was added because no hazards were mentioned, other than the welding supplies the men typically worked with. (TX, p. 661). Mr. Heiskell had the men sign these sheets at the beginning of meetings, and he would list the topic later; he explained that allowed him to add additional subjects raised during the meeting. (TX, p. 662, 716-17). Mr. Heiskell denied listing any subject which had not been discussed.[40] (TX, p. 662).

Mr. Smith testified Mr. Heiskell and Mr. Rogers tried to get the workers to read and sign a page from the Plaas, Inc. job site handbook acknowledging HAZCOM training they never received. (TX, p. 38; EX-47, p. 28). Mr. Smith testified that the extent of HAZCOM training was being given a booklet to read; at the hearing, he could not remember the subjects it covered. (TX, pp. 43-44). Later, Mr. Smith and Mr. Mourfield denied ever receiving HAZCOM training. (TX, pp. 63-64, 70; 289, 1075-76).

Mr. Heiskell asked everyone to sign to acknowledge review of the handbook because he was having problems with some of the men arriving late, including Mr. Mourfield; he wanted to be sure everyone was aware of Plaas, Inc.'s policies on absenteeism and tardiness. (TX, pp. 674-75, 708). Mr. Heiskell said he may have met with Mr. Mourfield on December 15 or 16, 1998 regarding HAZCOM training, but Mr. Mourfield had never explained what chemicals he was concerned about;

Mr. Heiskell said this was the only conversation he recalled having with Mr. Mourfield on this subject.(TX, p. 656, 704). Mr. Heiskell felt that as a trained welder, Mr. Mourfield should already be "qualified" in the tools and materials of a welder.[41] (TX, p. 740; see also p. 749-50).

---

[38] "Housekeeping" refers to keeping work areas clean, to prevent tripping. (TX, p. 660).

[39] Mr. Heiskell said the general contractor had no hazards on the site, other than what the Plaas, Inc. employees were working with. (TX, p. 741).

[40] The court notes CX-5F is original, and EX-35 is a copy. The phrases "job handbook hazard communication," and "no hazards other than what we work with" were written with a different pen than the rest of the original. The court also notes that the printed names on EX-35 are not present on the original. Mr. Heiskell said he did not know who printed the names on this copy. (TX, p. 661-62).

[41] Mr. Heiskell admitted he had never seen any of Mr. Mourfield's certifications, and never gave him a formal welding test. (TX, p. 740).

Mr. Mourfield testified that Mr. Heiskell stopped him on his way to work December 16[42] and told him to read and sign the job site handbook.[43] (TX, p. 321, 419, 422). This page had several statements on it, and workers signed to signify that they had read and understood the various policies described. (TX, p. 420; see also EX-47, p. 28). Mr. Mourfield did not recall Mr. Heiskell saying why he wanted him to sign on that particular day, but he acknowledged that Mr. Heiskell did not mention OSHA, and he had no facts to suggest Mr. Heiskell knew he had contacted OSHA at that point. (TX, p. 421, 423, 430). Mr. Heiskell denied any sudden urgency to have the men sign. (TX, p. 709).

Mr. Smith signed, but Mr. Mourfield refused. (TX, p. 39; 605). Mr. Mourfield specifically objected to the statement: "I have been trained by Plaas Incorporated regarding the company Hazard Communication (Right to Know) program." (EX-47, p. 28; TX, p. 322, 420; see generally CX-12A, 12B). He said "I would have been lying" and he thought he would be breaking the law to say he had received training he had not actually received. (TX, p. 290, 322, 674-75). Mr. Mourfield said Mr. Heiskell seemed surprised,[44] so he showed him that the HAZCOM section in the handbook merely referred the reader to a separate Hazard Communication training program, and Mr. Heiskell had said that information was not on-site.[45] (TX, pp. 323-24). When they discussed on-site chemicals, Mr. Heiskell seemed to focus on rubbing alcohol, asking if Mr. Mourfield felt that was a dangerous chemical.[46] (TX, p. 324-25). Mr. Heiskell indicated he would check into the matter further, but said he would sign the sheet himself to acknowledge that he had provided the handbook to Mr. Mourfield. (TX, p. 323, 675). Before returning to work, Mr. Mourfield asked Mr. Heiskell to assure him he would not be fired for not having been trained in HAZCOM, and Mr. Heiskell did so. (TX, pp. 325-26).

---

[42] Mr. Mourfield taped a conversation with Mr. Heiskell about HAZCOM and MSDS; the transcript of this conversation is dated December 16, 1998. (See CX-12A). In addition, EX-6 (Plaas, Inc.'s letter regarding absences and tardiness) indicates he was absent December 15, 1998, except for a meeting with Mr. Heiskell where he was told to get a doctor's excuse.

[43] Later, Mr. Mourfield could not recall exactly what time this occurred, but said it was sometime in the morning. (TX, p. 423). Mr. Mourfield admitted: receiving the handbook when hired, still possessing his copy, and that he was being asked to sign the last page of a handbook he had already seen and read. (TX, p. 420-21). However, Mr. Heiskell could not recall whether Mr. Mourfield was asked to sign this same document when he was hired. (TX, p. 708).

[44] Mr. Mourfield said Mr. Heiskell was calm and did not get angry. (TX, p. 422, 429-30, 675).

[45] However, Mr. Heiskell testified that the Plaas, Inc. HAZCOM book was present on the Bimbo Cereal site. (TX, p. 631). Mr. Rogers also said "they had all you needed to have, everything – if you didn't feel safe, he had the paperwork on it." (TX, p. 529).

[46] Mr. Heiskell denied he "mocked and trivialized" Mr. Mourfield's concerns by focusing on rubbing alcohol. (TX, p. 740).

Mr. Plaas said he was unaware whether the men were asked to sign a possibly false document, or why it had happened. (TX, p. 141-42). Mr. Plaas also denied he was called on December 16, 1998 about Mr. Mourfield's refusal to sign (TX, p. 846), and said he first became aware of his refusal several days after the OSHA inspection. (TX, p. 166). Mr. Plaas said he would not expect nor want his supervisors to ask workers to sign an untrue document. (TX, p. 141-42). Mr. Plaas said if Mr. Heiskell actually had asked workers to sign a false certification, he would explain to him that he had probably made an error in judgment; later, Mr. Plaas said he "may" fire a supervisor for that. (TX, p. 865-66). At the first hearing, Mr. Plaas said he had not investigated the allegation, and did not know if he would, other than to ask the supervisors about it. (TX, p. 142-44, 866).

After the site visit of December 16, 1998, OSHA issued Plaas, Inc. a citation for failing to "develop, implement, or maintain a written hazard communication program" (CX-3A, EX-30); Mr. Plaas said this was not done because "there was never anything hazardous on this site or that ever endangered his life."[47] (TX, p. 145, 169). Mr. Plaas also said he felt that Plaas, Inc. had provided adequate training for the work through safety meetings and weekly toolbox talk meetings. (TX, p. 217-218). If any additional training was needed, the general contractor would have instructed that additional training was required. (TX, p. 218).

Mr. Heiskell was also responsible for MSDS and the "right to know" program, which gives the workers the right to know about any chemicals or hazardous materials in the workplace. (TX, p. 632). Mr. Mourfield stated that he relies on MSDS to learn about the materials he will be working with. (TX, p. 293; see also CX-4A-4G). However, Mr. Mourfield said some MSDS's have become outdated due to advances in research and study. (TX, p. 295).

Mr. Heiskell said each subcontractor was required to provide any MSDS to the general contractor to keep in its offices. (TX, p. 632, 738). Mr. Heiskell denied telling Mr. Mourfield the only MSDS he provided to the general contractor was for "solarflux," and said he had also provided sheets for acetylene, oxygen, and others, except alcohol. (TX, p. 703, 739; see also CX-12A, 12B).

Mr. Mourfield denied he was allowed access to the MSDS,[48] even though he asked Mr. Heiskell to see them several times, and had discussed the subject with Mr. Rogers. (TX, p. 290). Mr. Mourfield specifically alleged that workers were forbidden access to the general contractor's trailer by both Mr. Heiskell and Mr. Rogers. (TX, p. 291). Mr. Smith confirmed that there were no MSDS in the Plaas trailer, and he said he was never told whether he was allowed to enter the general contractor's trailer to review the MSDS's kept there. (TX, p. 39, 64).

---

[47] Mr. Mourfield's counsel questioned Mr. Plaas' qualifications to make such a blanket statement; Mr. Plaas admitted that he received little or no welding training over the last 30 years, that he did not know airborne welding byproducts, etc. (TX, pp. 145, 148-49).

[48] Later, Mr. Mourfield flatly denied were any MSDS. (TX, p. 1076).

However, Mr. Heiskell testified that "everybody was told that they were in the general contractor's office. They had them on a table .... they had five copies of the MSDS sheets in the general contractor's trailer." (TX, p. 742). Mr. Heiskell denied Mr. Mourfield ever asked him to see MSDS,[49] and specifically denied turning down a request to see them. (TX, p. 703, 769). Mr. Heiskell also denied there was any policy against employees going to the general contractor's trailer, saying Mr. Mourfield "was allowed to go in there [the general contractor's trailer], if he had any problems with anything he wanted to know," and that the general contractor had said "send anybody they [sic] wanted in the trailer." (TX, p. 743, 769). Mr. Heiskell did not care whether the workers went to him first: "if they had a problem, you know, if I wasn't there, they could go in there and read the books .... and look at what they wanted to find." (TX, p. 769). Mr. Plaas also confirmed MSDS were available, and "any employee on that job site has access to them at any time," but said he never heard of Mr. Mourfield raising any concerns about MSDS.[50] (TX, pp. 163-64).

Plaas, Inc. received another OSHA citation for failure to provide a method of access to the MSDS for employees. (TX, p. 168). The court notes that this citation was not for failure to have MSDS on-site, but for failing to ensure employee access. Mr. Plaas refused to disagree with the OSHA findings, but stated "there never has been a MSDS issue on that site."[51] (TX, p .163). Mr. Plaas did not know the cost to have MSDS in the Plaas, Inc. trailer as well. (TX, p. 217).

G. Other Allegations of Protected Activity

1. Hazards, Generally

Mr. Mourfield testified that welding is a dangerous occupation: welding releases fumes and particles which can harm the respiratory system and cause illness if respirators or adequate ventilation are not provided; there is also a risk of explosion or electrical shock associated with welding. (TX, p. 278-80). However, Mr. Plaas refused to describe welding as hazardous (TX, p. 118), and said he did not feel the welding done on the Bimbo Cereal site was hazardous. (TX, p. 170). However, Mr. Plaas later agreed that welding is hazardous or "can be a hazardous job." (TX, p. 684, 878-79).

Mr. Rogers acknowledged that construction is hard, dangerous work, and that welding can

---

[49] However, Mr. Heiskell testified previously that he did discuss the subject with Mr. Mourfield once, and he had told Mr. Mourfield where the MSDS were, but Mr. Mourfield never said what he wanted to see. (TX, p. 655-56; see also CX-12A, 12B).

[50] Mr. Plaas said that even if the allegation regarding denial of access to the general contractor's trailer were true, he still felt Mr. Mourfield should have first raised any concerns or questions to Mr. Heiskell, who would have then obtained the requested information or sent Mr. Mourfield to the general contractor's trailer. (TX, p. 164)

[51] Plaas, Inc. did not appeal the two OSHA citations it received (TX, p. 167-68), and no monetary penalties were proposed. (CX-3A, pp. 5-6; EX-30, pp. 5-6).

be dangerous in a confined space.[52] (TX, p. 583). Mr. Rogers also admitted welders can suffer other types of illness and injury. (TX, p. 584). However, Mr. Rogers denied Plaas, Inc. had "chemicals" on the job site, but said other contractors did. (TX, p. 584-85). Mr. Heiskell also did not remember any chemicals on the job site. (TX, p. 699). However, he admitted tanks of oxygen, acetylene, and argon were used, and that they are all dangerous substances. (TX, p. 700). Mr. Heiskell said he did not recall ever discussing welding accidents with Mr. Mourfield. (TX, p. 702).

2. Burning Trash, Risk of Explosion

Mr. Mourfield said Plaas, Inc. workers would stack trash for pick-up by the general contractor, who then burned all of the trash from the site. (TX, p. 312, 391, 393). Mr. Mourfield saw cardboard, plastic, insulation, rubber mats, cans of pipe cleaner, cans of pipe dope, cans of pipe glue, and other materials burned in a large fire approximately 15-20 yards from a storage area for both empty and full cylinders of argon, oxygen, acetylene, and propane. (TX, pp. 314-15, 391-92). Mr. Mourfield described this fire as usually about twenty feet on a side, and from six to ten feet high, burned two to three days a week. (TX, p. 482-83). Mr. Mourfield was unaware of any burn permit (TX, p. 318), and based on his training and experience, he felt the general contractor may have been violating the law.[53] (TX, p. 392). However, Mr. Mourfield did not bring any charges against the general contractor because "it was all Plaas' stuff that he was burning." (TX, p. 393). Mr. Mourfield said he could not record the site on videotape (CX-1) because the area of the fire had been "smoothed over by heavy machinery." (TX, p. 314).

Mr. Mourfield said he had discussed the burning of waste and debris with Mr. Rodgers and numerous other Plaas, Inc. employees prior to the OSHA visit on December 16, 1998. (TX, p. 1030). Mr. Mourfield said he frequently saw and heard aerosol spray cans in the fire explode and shower sparks (TX, p. 394), and Mr. Rodgers would refer to the exploding aerosol cans as "little missiles." (TX, p. 1030). Mr. Mourfield said "me and [Mr. Rodgers] just got in a little conversation about that was dangerous, and he said yes, that was dangerous, but that's as far as that one went." (TX, p. 1030). Mr. Mourfield said Mr. Rogers seemed surprised such activity was occurring. (TX, p. 1030-31). Mr. Mourfield said he was concerned that any explosion on the Bimbo site as a result of these bonfires could reach nearby tanks of diesel fuel, ammonia fertilizer, and tractor trailers full of unknown substances kept at an adjacent site, resulting in large scale contamination of the surrounding area (including farmland, cattle, and lakes). (TX, p. 316-17).

Mr. Plaas testified he never saw any burning on his visits, and he did not know if any was

---

[52] Mr. Rogers has heard of welder deaths as a result of argon gas filling up a plastic "hooch," but he has not heard of any deaths while working "in a building ... once it's roofed in and it's got walls," especially an open building with no doors and ventilation such as on the Bimbo Cereal site. (TX, p. 584).

[53] While Mr. Mourfield admitted that burning frequently does occur on construction sites, he said toxic or hazardous materials usually are not burned. (TX, p. 393).

occurring. (TX, p. 988). Mr. Plaas also did not know what materials were burned, and did not know if any Plaas, Inc. trash was burned. (TX, p. 988, 992, 994). However, Mr. Plaas denied that Plaas, Inc. or any other contractor had ammonia tanks on-site. (TX, p. 235-36). Mr. Plaas said the ammonia tanks Mr. Mourfield referred to are approximately two-tenths of a mile from the job site. (TX, p. 237; see also EX-58, CX-1). Between the Bimbo Cereal site and these tanks are: a fence; a "totally different" company with grain silos, warehouse, and parking lot; and a county road. (TX, pp. 240-242; see also CX-1, CX-9). Mr. Smith testified he did not recall any large tanks of ammonia kept by Plaas Inc., and did not recall a natural gas line coming into the plant. (TX, p. 50-51; see also Complainant's April 16, Amended Complaint, item 16).

Mr. Plaas also testified that the burning shown on Mr. Mourfield's videotape (CX-1)[54] was on property south of the road, away from the Bimbo Cereal plant itself. (TX, p. 242). Mr. Plaas did not know what was being burned, or who owned the land where the burning and these tanks were located; he also said Plaas, Inc. also never did any work on this site, and that no one from Plaas, Inc. or the general contractor burned there. (TX, p. 242-43, 247). Mr. Mourfield admitted he does not know who the burn pit shown on CX-1 belongs to, nor does he know whether it actually is on the Bimbo Cereal site. (TX, p. 388). Mr. Mourfield also admitted he had never seen any Plaas, Inc. employees working on that site. (TX, p. 389). Even though he acknowledged that the tanks may not have belonged to Plaas, Inc. or been on the Bimbo Cereal site, Mr. Mourfield continued to maintain that Plaas, Inc. had some responsibility, as "safety is everyone's responsibility." (TX, p. 390).

3. Drunk Worker

Mr. Mourfield testified he once spoke to Mr. Rogers about an allegedly intoxicated employee. (TX, p. 309, 512, 597, 599). However, Mr. Heiskell first said Mr. Mourfield never discussed the allegedly intoxicated worker with him (TX, p. 699); after hearing the audiotape (CX-11A, 11B), he recalled that Mr. Mourfield had mentioned this, but said Mr. Rogers told him the

worker was not drunk. (TX, pp. 752-53). Mr. Plaas said he never heard of the allegedly drunk worker until it was discussed in the hearing. (TX, p. 841).

Mr. Mourfield, based on his law enforcement training and experience, was tendered without objection as an expert in spotting intoxicated individuals. (TX, p. 927-29). Based on his training and experience, Mr. Mourfield felt the worker was legally drunk that day. (TX, p. 308, 599, 929-30). The worker was dropping things and falling down, but apparently was not feeling any pain from his falls. (TX, p. 928-29). Mr. Mourfield said he also noticed a strong odor of alcohol, and that the man's speech was slurred. (TX, p. 929). Mr. Mourfield admitted that he did not perform a Breathalyzer or other non-invasive test on the worker, nor did he make him "walk a line," because he had no authority to ask the worker to submit to such tests. (TX, p.930, 933-34). However, Mr. Mourfield later said

---

[54] Mr. Plaas disagreed that the videotape introduced by Mr. Mourfield accurately reflected the site, especially some of the distances discussed in the audio portion of the videotape. (TX, p. 151; see also CX-1)

he did ask the worker to count backwards, although he "forgot" to mention this in his earlier testimony, and admitted that this or other field sobriety tests he may have performed "never come up on the tape." (TX, p. 932-33; see also CX-11A, 11B).

Mr. Mourfield said Mr. Rogers told him he had also noticed the worker behaving oddly that day. (TX, p. 209). However, Mr. Rogers testified that after Mr. Mourfield reported the allegedly drunk worker to him, he met with the man but could not detect any odor of alcohol. (TX, p. 512-13, 597, 599). Mr. Rogers said he "seemed to be functioning all right to me," and that he "was always hyper." (TX, p. 598, 600). Mr. Heiskell did not check the allegation of a drunk worker himself. (TX, p. 754-55).

Mr. Mourfield said that later the same day he noticed this allegedly drunk worker operating a forklift carrying gas cylinders, and driving near other cylinders of oxygen, acetylene, and argon, as well as a propane heater. (TX, p. 310, 311). Due to the tremendous pressure inside these cylinders, if a top broke off, the cylinder would become "a missile." (TX, p. 310). Mr. Rogers denied he assigned the man to this work, explaining that driving a forklift was a normal part of his duties: "we all worked on the forklift." (TX, p. 513-14, 598).

If he had suspected drug or alcohol use, Mr. Rogers could bring the worker to Mr. Heiskell for further disciplinary action, including drug or alcohol testing. (TX, p. 598-99). Mr. Heiskell said drunkenness was a firing offense under Plaas, Inc. rules, but the worker in question was not fired. (TX, p. 754-55). Mr. Rogers said the man did not have any accidents that day and no one else reported he may have been drunk. (TX, p. 514). Mr. Rogers and Mr. Mourfield agreed that a drunk or drugged worker would be a safety concern on the job-site. (TX, p. 600, 929).

4. Argon Leaks and Confined Spaces

Mr. Smith said he frequently worked with argon gas, which he described as a dangerous chemical. (TX, pp. 44-45). Mr. Mourfield testified he frequently observed argon leaking from cylinders, caused by the failure of workers to completely close the valves, or to close their welding rigs. (TX, p. 304-05). Mr. Rogers was allegedly notified by Mr. Mourfield of other leaks in the equipment shortly after he began work; Mr. Rogers had approached Mr. Mourfield about what seemed to be his wasteful use of argon gas. (TX, pp. 1034-36). After Mr. Mourfield pointed out the damaged and defective equipment he had been provided, Mr. Rogers brought him electrical tape to try to stop some of the leaks, and said "there's nothing we can do..." about others. (TX, p. 1034-35). Mr. Mourfield eventually chose to use some of his own equipment which did not leak, but leaky supply hoses were never replaced. (TX, p. 1035-36).

Mr. Smith testified that he engaged in confined space welding in the "steeps" without a tester and without seeing a permit. (TX, p. 272-73; see also CX-8 and TX, pp. 300-01 for diagram). Mr. Smith testified that although he considered this to have been a dangerous situation, he did not complain, and could give no reason why he did not. (TX, p. 274-75). Mr. Mourfield testified that he also saw Mr. Clampet and Mr. Pond welding in the confined space of the steeps without

appropriate safety measures. (TX, pp. 299-300, 303).

Mr. Rogers admitted that Mr. Smith had welded inside of the steeps, and that it could be considered "confined space" welding, but he said either Mr. Pond or Mr. Shane Houser should have been watching Mr. Smith for any sign of distress. (TX, p. 586-87). Mr. Rogers said he was unaware of allegations that a second man was not always on watch. (TX, p. 587). Mr. Heiskell said there was only one area where any confined space welding occurred, and that this was fully monitored with the welder wearing a safety harness, etc. (TX, p. 681). Mr. Heiskell also admitted it was possible Mr. Smith had welded inside the "steeps," but said he did not recall it. (TX, p. 681-82). Mr. Heiskell said all welding on the "steeps" was supposed to be exterior, and that based on his experience, the welding Mr. Smith did on the exterior was not dangerous. (TX, p. 683-84).

5.. Other

Mr. Mourfield briefly described several other instances of what he thought to be unsafe work practices. These included: failure to use "blinds" to shield other workers from the "harmful rays" produced by welding (TX, p. 296); welders filling the gas tanks of welding machines and generators, often resulting in fuel spillage on shoes and clothing which could catch fire (TX, pp. 296-97); inadequate ventilation for welding stainless steel, with no devices to measure air flow (TX, p. 297); damaged or poorly repaired extension cords (TX, p. 305); damaged and missing body harnesses (TX, p. 305-07); and alcohol soaked rags piled on the floor near welders. (TX, pp. 307-08). Based on these and other unspecified conditions he observed, Mr. Mourfield felt there was a risk of explosion, fire or accident, which could then lead to an environmental release.[55] (TX, p. 311). Despite the fact that he considered the job site to be dangerous, Mr. Mourfield continued to return to work to support his family; however, he admitted he sent some applications out. (TX, p. 488). However, Mr. Mourfield denied he wanted to work elsewhere. (TX, p. 489).

Regarding Mr. Mourfield's allegations of inadequate ventilation,[56] Mr. Plaas agreed that welding in a "confined space" could be hazardous, but he disagreed that a roofed in building was a confined space. (TX, p. 120). In his opinion, a "confined space" was a much smaller area, such as a tank. (TX, p. 120; see also p. 232 for further explanation). Mr. Plaas said he was not aware of any devices in use at the plant to measure the amount of air circulation, nor were any respirators used because the building was incomplete, with large open areas, missing windows, and other sources of ventilation, giving "plenty of air flow through that whole place at all times." (TX, p. 149-50).

---

[55] In contrast, Mr. Smith said the work site was actually a fairly safe place; he rated it as a five on a scale of 1 to 10. (TX, p. 73). Mr. Smith also said the only toxic chemical releases he was aware of were paint and welding fumes, which he described as "pretty typical." (TX, p. 52).

[56] Mr. Mourfield explained argon is heavier than air and settles low to the ground; when a worker using argon is low and surrounded by toolboxes and other construction equipment, a confined space of sorts is created, impeding the dispersal of the argon. (TX, pp. 298-99). Mr. Mourfield explained a person will suffocate from breathing too much argon. (TX, p. 1036)

However, Mr. Heiskell said Mr. Mourfield never discussed possible safety or environmental concerns with him. (TX, p. 654-55). After hearing CX-12B, a tape of a conversation between Mr. Mourfield and himself, Mr. Heiskell agreed that Mr. Mourfield had at least asked some questions about workplace safety prior to the OSHA visit. (TX, p. 738). Mr. Plaas also said he was unaware of any reports or complaints by Mr. Mourfield regarding burning or release of hazardous chemicals, or possible contamination of drinking water. (TX, p. 247). Mr. Plaas testified that as of December 15, Mr. Heiskell had not mentioned Mr. Mourfield reporting any possible environmental concerns. (TX, p. 844-45). Mr. Rogers said he could recall no other incidents of Mr. Mourfield reporting unsafe working conditions. (TX, p. 514).

III. Events of December 16, 1998

A. OSHA and Mr. Mourfield

Mr. Mourfield contacted OSHA about possible violations on the Bimbo Cereal site several days prior to the OSHA inspection of December 16, 1998. (TX, p. 318). Mr. Mourfield did not recall whether he listed all contractors on the site, or just Plaas, Inc. (TX, p. 382-84). Mr. Mourfield also denied he was able to list all of his concerns about the site. (TX, p. 382).

Mr. Plaas denied any prior knowledge of the OSHA visit, and said he did not know whether OSHA usually calls employers prior to a visit (TX, p. 140); Mr. Heiskell denied that OSHA usually calls before making a site visit. (TX, p. 709). Mr. Mourfield said he could not prove Plaas, Inc. had prior knowledge of the visit, but said the mood that day was "weird" and "on-edge." (TX, p. 326). Mr. Mourfield described Mr. Rogers as "ready to go off, I mean, very, very, very violent" (TX, p. 326), and Mr. Heiskell as acting "very nervous that morning." (TX, p. 424, 428). Later, Mr. Mourfield denied saying everyone was on-edge, and said the mood did not change until the afternoon. (TX, p. 417). Mr. Mourfield then testified that he meant only Mr. Heiskell and Mr. Rogers were acting strangely the morning of December 16. (TX, p. 418, 430). Mr. Mourfield denied that he himself was acting differently that morning. (TX, p. 418, 430). Mr. Heiskell denied anyone was acting strange the morning of December 16, 1998. (TX, p. 674).

Mr. Heiskell testified he was in the Plaas, Inc. trailer when two Plaas, Inc. employees entered, "hollering, OSHA, or OSHA was here." (TX, p. 664, 711). Mr. Heiskell calmed the men, told them to return to their work areas, and then set out to find the investigator. (TX, p. 664, 711). A foreman for the general contractor told him to go to the general contractor's trailer; there Mr. Heiskell found other superintendents and the OSHA investigator, Mr. Gallop. (TX, p. 664). They reviewed records of safety meetings, books on HAZCOM training, MSDS, and other documentation. (TX, p. 664-65).

Mr. Heiskell, Mr. Gallop, and some of the other contractors' managers then began a "walk

through" of the site. (TX, p. 665). Mr. Gallop wished to speak to all of the Plaas, Inc. employees, and he was able to do so. (TX, p. 665-66). Mr. Gallop noticed some equipment abandoned by Mr. Smith and Mr. Mourfield, and was told by Mr. Rogers that the men were waiting in the Plaas, Inc. trailer because they did not feel they had been properly HAZCOM trained. (TX, p. 521). The investigator asked to speak with them, and Mr. Rogers retrieved them. (TX, p. 521).

Mr. Mourfield indicated that he had not received adequate HAZCOM training or access to MSDS. (TX, pp. 334-35; see also TX, p. 36 (Mr. Smith)). Mr. Mourfield also said he and Mr. Smith had been fired by Mr. Rogers for attempting to find the investigator. (TX, p. 318, 334; see also TX, p. 36). At the second hearing, Mr. Mourfield said he also briefly discussed leaking argon in front of both Mr. Heiskell and Rodgers. (TX, pp. 1033-34). Mr. Mourfield said Plaas, Inc. managers were present for the entire discussion, listening in from a distance of fifteen feet, "standing there with amazement that I was [telling] a government official what was going on ...."(TX, pp. 1031-32). Eventually Mr. Gallop told Mr. Mourfield they could meet privately later. (TX, p. 1032). When the walk-around finished, all the supervisors returned to the office, and Mr. Gallop discussed exactly why he was there and what he would do. (TX, p. 666).

Mr. Mourfield said he and Mr. Smith were invited by Mr. Gallop to sit in on the meeting with the supervisors. (TX, p. 335). At this meeting, Mr. Gallop asked questions about posters describing various worker rights under HAZCOM, posters which were allegedly not present in the Plaas, Inc. trailer. (TX, p. 46). Mr. Heiskell offered to show the poster to Mr. Gallop, but he declined. (TX, p. 666). Mr. Rogers denied ever being asked about or discussing the subject of posting previously, and said there was a poster on worker's rights posted in the trailer.[57] (TX, p. 559-60).

Mr. Gallop then held a private meeting with Mr. Mourfield and Mr. Smith. (TX, p. 336). Mr. Mourfield said "it really ... pissed Rodger Rogers off that we were talking to OSHA in private again." (TX, p. 1032). Mr. Mourfield said Mr. Heiskell "wasn't happy, but he wasn't – I wasn't getting dog stares or you're-a-dead-man kind of look ...." (TX, p. 1032). During this meeting, Mr. Mourfield repeated concerns about the lack of HAZCOM training, and discussed his alleged firing. (TX, p. 336). At the second hearing, Mr. Mourfield said he had also repeated concerns about leaking argon, his discussion of the leaks with Mr. Rogers, and other concerns, such as the bonfire. (TX, pp. 1031-32, 1033-34). Mr. Mourfield said they discussed what was burned, the possibility of chemical releases, that he had told Plaas, Inc. of it, and that other workers had witnessed the same thing.[58] (TX, p. 1031-33). Mr. Mourfield said he also discussed pollution with Mr. Gallop, including the actual release of chemicals into the air, and potential contamination of the local aquifer, although exactly when he had

---

[57] Mr. Heiskell identified EX-37B as a poster describing various worker's rights. (TX, p. 663). Mr. Heiskell said that this poster, or one like it, was posted next to the door inside the trailer. (TX, p. 663). He also said that the poster in the office contained all of the information contained in EX-37B. (TX, p. 663).

[58] The court notes that at the first hearing, Mr. Mourfield only described burning in general terms, and that some burning occurred near ammonia tanks (as shown in CX-1). (TX, p. 387).

these discussions with Mr. Gallop is unclear from the transcript. (See TX, p. 1049). Mr. Mourfield said he also discussed the potential for accidents at the site, and his concern that any accidents might lead to a potential environmental disaster. (TX, p. 1050). Mr. Mourfield said this meeting lasted about 20 minutes. (TX, p. 1048).

Mr. Mourfield admitted at the September 1999 hearing that he had not testified at the previous hearing about raising some of these environmental concerns. (TX, p. 1048). However, Mr. Mourfield denied his earlier testimony was inaccurate and blamed the absence of such testimony on poor questioning by the attorneys.[59] (TX, p. 1048).

Although Mr. Mourfield spoke with the OSHA investigator three times on December 16, 1998, he denied he was able to describe all of his concerns to, saying the investigator only had enough time to hear "the basics." (TX, p. 386-87). Mr. Mourfield also said he discussed only some of his allegations of hostile work environment with Mr. Gallop, saying "Some I did and some I didn't." (TX, p. 1055). Mr. Mourfield said he did not mention in his earlier testimony that he had reported the hostile work environment to Mr. Gallop because it would have been impossible to describe the full meeting in only a brief answer to a question. (TX, p. 1056).

At the June 1999 hearing, Mr. Mourfield described his private meeting with Mr. Gallop as a "good meeting," and said Mr. Gallop was "super nice to us." (TX, p. 336, 1048). However, at the September 1999 hearing, Mr. Mourfield said that once the OSHA report came out, he felt Mr. Gallop was dishonest, despite his previous glowing description of him.[60] (TX, p. 1050). Mr. Mourfield said he was "shocked" that Mr. Gallop apparently only listed things discussed in front of the supervisors, "what he had to put down ...."[61] (TX, p. 1051).

After the private meeting concluded, Mr. Heiskell and other supervisors walked Mr. Gallop to his car, he provided them with some information on HAZCOM training, said he would send more information later, and then left. (TX, p. 666, 725). Mr. Gallop did not discuss any concerns he had not written up, nor his "final verdict." (TX, p. 725). Mr. Heiskell estimated the total OSHA visit lasted from noon to five p.m. (TX, p. 667).

As described above, Plaas, Inc. was eventually cited for "failing to develop, implement, or

---

[59] The court notes that protected activity was not at issue in that hearing, although the parties did put forth some evidence on the subject anyway.

[60] Mr. Mourfield admitted he had seen the OSHA citations at the time of the first hearing, and thus was aware of what Mr. Gallop had focused on, and that Plaas, Inc. had not been assessed any penalties. (TX, p. 1051). Mr. Mourfield said he has never seen any notes Mr. Gallop may have taken of the private meeting. (TX, p. 1050).

[61] Despite requests by the parties, none of the OSHA personnel involved in this matter agreed to testify.

maintain a written hazard communication program" and for for failing to develop a method to insure that employees had access to MSDS's on the job site. (TX, p. 741-42; CX-3A, p. 5). Mr. Plaas said he agreed that the OSHA citations were proper, and he chose not to appeal them. (TX, p. 235). Plaas, Inc. was not cited for any improper posting, burning, conducting dangerous activity close to explosive materials, release of chemicals, or for any environmental violations. (TX, p. 235, 1004).

B. Firing

Mr. Mourfield first learned an OSHA investigator was on the job site from another worker. (TX, p. 329). Mr. Smith said Mr. Mourfield wanted to look for the investigator, and asked him to help. (TX, p. 34). While searching, they met Mr. Rogers and told him they were looking for the OSHA investigator; he told them to go back to work or be fired.[62] (TX, pp. 34-35, 39; 410, 431). Mr. Mourfield said Mr. Rogers "was hot already", but he denied saying or doing anything to anger him other than to say he wanted to see the OSHA investigator. (TX, p. 330, 431). Mr. Mourfield refused to return to work, saying he had not been properly trained and needed to speak to the investigator.[63] (TX, p. 330). Mr. Smith admitted that Mr. Rogers never said they could not talk with the OSHA investigator, just that they should go back to work until he was available. (TX, p. 53). When Mr. Mourfield still insisted he speak with the OSHA investigator immediately, Mr. Rogers allegedly said "you're fired" several times, then ordered them to the trailer.[64] (TX, p. 35, 320, 330).

Mr. Rogers' version of events is slightly different. He testified he first became aware of the OSHA visit after lunch, when Mr. Stafford and Mr. Clampet came to the Plaas, Inc. trailer and said OSHA was on the job site. (TX, p. 514). Mr. Rogers and Mr. Heiskell then noticed Mr. Mourfield and Mr. Smith returning from the general contractor's trailer; while Mr. Heiskell went to the other trailer, Mr. Rogers went to see what Mr. Mourfield and Mr. Smith were doing. (TX, p. 515). Mr. Rogers caught up with them in the "steeps" area and asked what was going on; Mr. Mourfield told him they were looking for OSHA. (TX, p. 515). Mr. Rogers told them to return to their work area, and that the OSHA investigator would be by soon. (TX, p. 515). Mr. Mourfield insisted on finding

---

[62] Mr. Smith's testimony on the exact wording used is unclear. He later agreed that Mr. Rogers told them to go back to work or they "could be" fired" (TX, p. 41, 60). However, under questioning from the court, he stated Mr. Rogers had "said we was fired." (TX, p. 54).

[63] Mr. Mourfield later denied specifically refusing to return to work, but said he insisted he "needed to find the OSHA man." (TX, p. 431-32). Mr. Mourfield disagreed that his insistence equaled a refusal to return to his work area, although he admitted he would not return until he had spoken with the investigator. (TX, p. 432). Mr. Mourfield later agreed that regardless of his reasons, he had refused an order to return to work. (TX, p. 433).

[64] Despite his frequent audio recording, Mr. Mourfield said he was unable to record this incident due to his bulky clothing, although he did attempt to reach the recorder. (TX, p. 433). Mr. Mourfield denied he ever said he had a tape of the incident. (TX, p.437). Mr. Mourfield also did not recall whether he took any notes regarding the events of December 16, 1998. (TX, pp. 416-17).

him, and Mr. Rogers again said he did not know where the investigator was, but he would make his rounds through the entire area. (TX, p. 515). Mr. Mourfield then said he did not feel safe because he had not been properly HAZCOM trained; Mr. Rogers asked them to come to the office, but Mr. Mourfield continued to insist he had to find the investigator. (TX, p. 516). Mr. Rogers said this continued, with voices rising, until he said that the men should come to the office or he would fire them for not doing as he asked. (TX, p. 516, 595). Mr. Rogers admitted he did not actually have any authority to do this, but said it to make his point. (TX, p. 596). Mr. Rogers denied screaming, but admitted he was trying to talk over Mr. Mourfield, so he had raised his voice. (TX, p. 596). Mr. Rogers also admitted he was angry because Mr. Mourfield was refusing to do as instructed and return to his work area, and then was refusing to go to the Plaas, Inc. trailer. (TX, p. 604, 612).

Once at the trailer, Mr. Rogers asked what hazardous chemicals were on site, and Mr. Mourfield replied that as the foreman he should know; Mr. Rogers then said there were no hazardous chemicals on-site, and Mr. Mourfield demanded that he repeat the statement into a tape recorder, holding it in front of Mr. Rogers face. (TX, p. 516). Mr. Rogers refused to reply and asked the men to wait until Mr. Heiskell returned. (TX, p. 517). Mr. Mourfield continued to talk while waiting, making comments that the job site would be safer if unionized, and saying into the recorder that Mr. Rogers "was giving him hostile body language and being hostile to him." (TX, p. 518). Mr. Rogers also said Mr. Mourfield stated that he was "going to shut this fucking job down." (TX, p. 518). During this time, Mr. Rogers said he made many notes in his own calendar (see EX-39, 40), and

denied responding to any of Mr. Mourfield's statements. (TX, pp. 518-19, 612). Mr. Rogers also denied ever asking Mr. Mourfield if he had called OSHA. (TX, p. 519). Mr. Rogers eventually decided to find Mr. Heiskell. (TX, p. 520).

Mr. Mourfield admitted that while waiting in the trailer he asked Mr. Rogers to repeat certain statements for his tape recorder, but the two men were approximately 60 feet apart at the time. (TX, p. 478-79). Mr. Mourfield said he did not "yell and scream" at Mr. Rogers, nor did he wave a tape recorder in his face. (TX, p. 361-362). Mr. Mourfield denied using any coarse or vulgar language that day, and said that anyone who said he did is a liar. (TX, p. 479-80). Mr. Mourfield specifically denied saying "I'm going to shut this fucking job down." (TX, p. 480). Mr. Rogers agreed that Mr. Mourfield was usually soft-spoken, respectful, polite, and usually did not curse; however, Mr. Rogers said that day Mr. Mourfield did. (TX, p. 596). Mr. Mourfield said he felt like an outcast while he waited because everyone knew what had happened, and those who came in the trailer gave him "dog stares." (TX, p. 339). Mr. Smith said they waited for 3 or 4 hours for Mr. Heiskell. (TX, pp. 35-36).

When Mr. Rogers found Mr. Gallop and the site supervisors in the boiler room during their walk-around, Mr. Gallop asked about the abandoned equipment; Mr. Rogers said Mr. Mourfield and Mr. Smith were waiting in the trailer because they did not feel safe due to the alleged lack of HAZCOM training. (TX, pp. 520-21). When Mr. Rogers returned with the men, Mr. Mourfield introduced himself, and Mr. Rogers heard Mr. Mourfield say he had contacted OSHA. (TX, p. 521). Mr. Mourfield and Mr. Smith met with the investigator for 10-15 minutes, discussing various subjects (see above). (TX, pp. 42-43). Mr. Mourfield also said he mentioned his firing to Mr. Gallop at this

time. (TX, p. 318, 334).

During the rest of the walk-around, Mr. Gallop explained to the supervisors that the workers should not be punished for anything they had reported.[65] (TX, p. 522-23). Mr. Rogers did not know what the investigator was referring to, but Mr. Stafford later told him it had been reported that he had fired Mr. Mourfield and Mr. Smith. (TX, p. 522-24). Mr. Rogers then realized what the investigator was referring to, returned to him, and denied firing anyone. (TX, p. 524-25).

When the supervisors returned to the office, Mr. Rogers went to check on the workers and found Mr. Smith and Mr. Mourfield leaning idly against a wall; when he asked why they were not working, Mr. Mourfield said they had been fired and were waiting for "pink slips." (TX, p. 523, 525). When Mr. Rogers denied firing them, Mr. Mourfield became angry, saying that perhaps Mr. Rogers' "pea brain" couldn't remember, and he insisted on speaking to someone with "more authority." (TX, p. 525). Mr. Rogers said he got a "little upset" when he was referred to this way. (TX, p. 612). Mr. Rogers brought the men to Mr. Heiskell at the general contractor's office, where he explained the dispute. (TX, p. 526). Mr. Rogers then returned to the field, until the conference call was held later that afternoon. (TX, p. 526).

While Mr. Mourfield admitted accusing Mr. Rogers of having a "pea brain," he said he did so while waiting to speak privately with the OSHA investigator. (TX, p. 479). He said Mr. Rogers had followed him around, repeating "I didn't fire you ... You're crazy ... You're a loon," so he turned around, told Mr. Rogers to leave him alone, and suggested anger must have taken over his "pea brain" and said he would only speak with someone in authority who could be calm. (TX, p. 479).

After their private meeting with OSHA, Mr. Mourfield and Mr. Smith returned to the Plaas Inc. trailer, and requested their "paperwork" from Mr. Heiskell so they could go. (TX, p. 336). Mr. Mourfield said Mr. Heiskell also denied that he and Mr. Smith had been fired, and attempted to joke about the situation. (TX, p. 337-338). However, at one point in his testimony, Mr. Heiskell seemed to admit Mr. Mourfield was fired that day, saying "that was the day – yes – they were fired." (TX, p. 704). Mr. Mourfield described Mr. Rogers as "all red-faced and just acting like he was going to have a panic attack, an anxiety attack" and he kept "screaming in the background" that he had not fired anyone. (TX, p. 337, 340). Mr. Heiskell eventually spoke with Mr. Plaas, who decided to put all the involved parties on a conference call.[66] (TX, p. 526, 667).

Although the conference call (discussed below) did not end until somewhere between 4:00 and 4:30 p.m., eventually Mr. Mourfield and Mr. Smith finished out their shifts. (TX, p. 530). Mr.

---

[65] However, Mr. Heiskell did not recall Mr. Gallop saying this. (TX, p. 726).

[66] Mr. Heiskell said he thinks Mr. Rogers may have spoken to Mr. Plaas at this time too. (TX, p. 667).

Smith said he considered himself to have been fired and rehired December 16, 1998.[67] (TX, pp. 52-53). However, Mr. Smith said he was never told he was being fired for being a whistleblower; and he said Mr. Heiskell never told them that they had been fired, and told them to go back to work. (TX, p. 61). Mr. Plaas said he agreed there may have been a hostile work environment December 16, 1998, due to the altercation between Mr. Mourfield and Mr. Rogers over the alleged firing. (TX, p. 136). He described it as a "very, very nonproductive day." (TX, p. 136).

C. Conference Call

Prior to the start of the conference call, phone records indicate several calls from the Plaas, Inc. trailer to Plaas, Inc. corporate headquarters in Minnesota. (TX, pp. 694-95; CX-10).[68] Mr. Plaas said that sometime between 2:30 and 3:30 p.m., Mr. Mourfield called Plaas, Inc. headquarters, told Mr. Plaas' secretary that he had been fired, and asked if he needed any additional paperwork.[69] (TX, p. 124). Mr. Plaas told his secretary to tell the caller that he (Mr. Plaas) would need to speak with Mr. Heiskell, and to have Mr. Heiskell call Plaas, Inc. headquarters. (TX, p. 125, 850). Mr. Plaas said this call was his first indication that anything unusual had happened that day, or that Mr. Mourfield had any complaints about the Bimbo Cereal site. (TX, p. 850, 1001).

Mr. Heiskell spoke briefly with Mr. Plaas prior to the conference call. (TX, p. 693-94, 850-51; CX-10 (2.9 minute call at 4:27 p.m.)). Mr. Rogers said Mr. Plaas spoke with him as well. (TX, p. 595). Mr. Plaas asked whether he had fired Mr. Mourfield and Mr. Smith, and Mr. Rogers said he had not fired them. (TX, pp. 594, 851-52). Mr. Plaas said both Mr. Heiskell and Mr. Rogers denied that Mr. Mourfield and Mr. Smith had been fired. (TX, p. 125). After speaking with both supervisors, Mr. Plaas decided that Mr. Mourfield had not been fired.[70] (TX, p. 126, 851-52).

Mr. Plaas said the purpose of the conference call was to attempt to learn what had happened that day. (TX, p. 134). He said his supervisors indicated that Mr. Mourfield was "very disruptive, out of control," and was "screaming and hollering in Roger's face, waving a tape recorder in his

---

[67] Mr. Smith testified he voluntarily quit January 9, 1999. (TX, p. 52).

[68] CX-10 was introduced and admitted at the hearing as phone bills documenting calls from the Plaas, Inc. trailer. Somehow these records are not present in the exhibits in possession of the court. However, the court's review of the transcript shows that the parties did not dispute the substance of the records, and therefore the court will rely on the transcript for the relevant information.

[69] Later, Mr. Plaas testified this call came in around 4 p.m. (TX, p. 847). Mr. Mourfield's attorney disputed who actually called, and said it was not Mr. Mourfield. (TX, p. 848-49).

[70] Under repeated questioning from Mr. Mourfield's counsel as to why Mr. Plaas would believe a supervisor instead of a worker, Mr. Plaas consistently responded that he has chosen his supervisors because he feels he can trust them. (See, e.g., TX, p. 134).

face."[71] (TX, pp. 135-136).

Since Mr. Heiskell was unable to set up the conference call from the Plaas, Inc. trailer, everyone moved to the general contractor's trailer. (TX, p. 851). Mr. Heiskell, Mr. Rogers, Mr. Smith,[72] and Mr. Mourfield were present (in Dawn, Texas) for the conference call. (TX, p. 668). During the call, Mr. Mourfield said several times that he had been fired, but Mr. Plaas repeatedly responded that no one had been fired.[73] (TX, p. 40, 526, 668; CX-6A, 6B). Mr. Plaas said that after speaking with the supervisors, he decided Mr. Mourfield had not been fired, and "that wasn't the issue." (TX, p. 135).

Mr. Mourfield also expressed concern about problems at the job site. (TX, p. 135; CX-6A, 6B). Mr. Heiskell said Mr. Mourfield mentioned a hostile work environment, but this was the first he had heard of it; he also said Mr. Mourfield was not clear about specific incidents. (TX, p. 670). However, Mr. Mourfield had indicated that he had recordings and notes evidencing the hostile work environment. (See CX-6A). Mr. Plaas asked about the location of these records numerous times[74] because he wished to investigate the claims as soon as possible. (TX, p. 197; CX-6A, 6B). Mr. Plaas said he thought that if Mr. Mourfield was making daily notes, he might have the notebook available at that time for immediate faxing. (TX, p. 197-98, 853-54). Mr. Plaas said he never received any additional information as to the cause of or examples of the hostile work environment. (TX, p. 1002). Mr. Rogers felt Mr. Mourfield was "beating around the bush" by refusing to provide any of his notes on the hostile work environment. (TX, p. 600). Mr. Mourfield explained he did not provide the evidence he claimed to have because: "[Mr. Plaas is] a phony. He didn't care. He made that evident on that tape. His managers made it evident that it was a laughing matter and it was a joke,"[75] (TX,

---

[71] Mr. Mourfield said he did not "yell and scream" at Mr. Rogers, nor did he wave a tape recorder in his face. (TX, p. 361-362).

[72] Mr. Heiskell said Mr. Smith never said anything. (TX, p. 670; see also CX-6A, 6B). Mr. Mourfield said Mr. Smith was quiet because "he was scared," and was primarily with Mr. Mourfield for support. (TX, p. 477).

[73] Mr. Plaas continuously denied that the men were fired that day. (TX, p. 266-67, 1025). Mr. Mourfield denied both during the conference call and at the first hearing that he wanted to be fired that day or that he had told anyone that. (TX, p. 344-45; CX-6A, 6B).

[74] At the hearing, Mr. Plaas admitted that the location of these notes probably wasn't something he had any right to know. (TX, p. 197).

[75] Mr. Mourfield alleges that during the conference call Mr. Rogers and Mr. Heiskell were "smirking, looking at each other, smiling, rolling their eyes, whispering ...." (TX, p. 466). However, the court's own review of the tape reveals only Mr. Mourfield's laughter. (CX-6B). Mr. Heiskell denied that either he or Mr. Rogers were laughing or making fun of anyone or anything during the call. (TX, p. 669-70).

p. 463). Mr. Mourfield said he recorded the conference call because he was afraid Mr. Rogers would physically attack him; he said Mr. Heiskell was constantly trying to calm Mr. Rogers. (TX, p. 342).

Mr. Mourfield said he did want Mr. Plaas to resolve his concerns, but he thought Mr. Plaas "... didn't care to. He didn't want to. He showed me he had no desire to solve it." (TX, p. 463, 465). Mr. Mourfield also does not feel Mr. Plaas was adequately concerned about his allegations,[76] despite the fact that Mr. Plaas said several times that he was concerned and he requested Mr. Mourfield's notebooks. (TX, p. 458). Mr. Mourfield also said he felt Mr. Plaas was trying to intimidate him and to play "mind games,"and that the attempts by Mr. Plaas to obtain more information were simply more harassment. (TX, p. 343-44, 487). Mr. Mourfield said he took a question by Mr. Plaas about his health to be a threat. (TX, p. 343; CX-6A, B). Mr. Mourfield also felt that Mr. Plaas missed an opportunity to address the situation further during the call because Mr. Rogers, who he had just had

an altercation with, was present. (TX, p. 465, 487). Mr. Heiskell said he was concerned about allegations of a hostile work environment, and was "going to look into it." (TX, p. 672). Mr. Plaas indicated that he would personally "handle everything" regarding the events of that day. (CX-6A, p. 6).

Although Mr. Mourfield complained he felt threatened on the job, Mr. Rogers said he did not act upset during the conference call. (TX, p. 527). Mr. Rogers also refused to agree that Mr. Mourfield had been interrogated by Mr. Plaas, and he recalled the exchange over the notes as "voices were raising ... not screaming, just raising," with the men trying to talk over one another.[77] (TX, p. 527, 600-01). In addition, Mr. Rogers said it was Mr. Mourfield who laughed and smiled during the call.[78] (TX, p. 527). Mr. Heiskell described Mr. Mourfield as calm and non-violent, but perhaps "a little" angry. (TX, p. 669). Mr. Plaas agreed Mr. Mourfield was respectful, and said he "handled himself quite well" during the call. (TX, p. 136-37).

Mr. Plaas said he was concerned that day, first over the alleged firing, and then over the hostile work environment allegations; he described both Mr. Heiskell and Mr. Rogers as "pretty calm,

---

[76] Mr. Mourfield admits this allegation is based on the content and tone of the taped conference call, and Mr. Plaas' alleged inaction afterwards. (TX, p. 464, 488). Mr. Mourfield argues that the tone of Mr. Plaas on the tape shows animus; however, the court finds Mr. Plaas' tone of voice to be unremarkable.

[77] Mr. Plaas admitted interrupting Mr. Mourfield numerous times during the call (TX, p. 200), but said "I can't say that I was angry, that I was real angry. I was trying to get my point across that I was concerned about the hostile environment ...." (TX, p. 852, 854).

[78] Mr. Heiskell said he could not recall whether Mr. Mourfield laughed. (TX, p. 670). Mr. Mourfield explained that any laughs heard on the tape were nervous laughs. (TX, p. 345).

considerate guys," and thus he was surprised by the allegations. (TX, p. 852). Mr. Plaas said he as "not really" angry about the OSHA inspection, and he did not think Mr. Heiskell was either. (TX, p. 140). Mr. Rogers said Mr. Plaas did not seem angry, and that if he has a temper, "I ain't never seen it."[79] (TX, p. 527, 601; see also TX, p. 723 (Mr. Heiskell)). Mr. Heiskell said Mr. Plaas appeared to be simply trying to get to the point of what had happened, and did not seem angry. (TX, p. 670, 690, 723, 732, 744). Mr. Heiskell said Mr. Rogers seemed upset, but not violent, and he denied that he himself was angry. (TX, p. 669-70). Mr. Rogers said he felt belittled, as he was unaware of any hostile work environment, and he had not fired Mr. Mourfield; he was also beginning to get angry because he felt he was being called a liar. (TX, p. 528).

Mr. Plaas said that after the conference call, he thought Mr. Mourfield's complaints about the Bimbo Cereal site consisted of being fired and subject to a hostile work environment. (TX, p. 1002). Mr. Plaas said he did not recall Mr. Mourfield complaining about any environmental problems at the job site, and no one told him that Mr. Mourfield or anyone else had any environmental concerns. (TX, p. 1002-04).

Afterwards, phone records show another 20 minute call from the Plaas, Inc. trailer to Plaas, Inc. headquarters. (TX, pp. 695-96). Mr. Plaas described this call as an inquiry into why there was suddenly such turmoil on this job site. (TX, pp. 854-55). In an attempt to calm the situation further, Mr. Plaas directed Mr. Rogers to apologize to Mr. Mourfield and Mr. Smith for the events of that day, including losing his temper and exchanging words with them. (TX, pp. 265-66, 594, 855, 899). Mr. Rogers said after the calls ended, he went to apologize as ordered, and rephrased his earlier statements, explaining that if Mr. Mourfield did not feel safe, he did not want him working, and so he had been ordered to the office. (TX, p. 528, 531). He also apologized if they had thought they had been fired, and said that what he was trying to convey was that if they felt unsafe, they should not be working, because men who feel unsafe are often hurt. (TX, p. 529). Mr. Rogers said both Mr. Mourfield and Mr. Smith were present during his apology. (TX, p. 531).

Mr. Heiskell said he spoke with Mr. Plaas that day on several issues, including the OSHA visit and the alleged firing of Mr. Mourfield, but he denied discussing Mr. Mourfield otherwise; however Mr. Heiskell also stated he could not remember the exact subjects discussed.[80] (TX, pp. 692-93, 696, 724-26, 759). Mr. Heiskell also denied discussing the proposed layoff of Mr. Mourfield that day, or "how to handle him." (TX, p. 696). Mr. Plaas also denied the lay off of Mr. Mourfield was discussed, and said the decision to lay him and others off had been made previously. (TX, p. 855).

D. Employer's Knowledge and OSHA

---

[79] Mr. Heiskell said Mr. Plaas is "easy to get along with . . . [and] he's never raised his voice at me." (TX, p. 723). Mr. Heiskell also said he has never heard or seen Mr. Plaas swear at him or another employee. (TX, p. 770).

[80] Mr. Heiskell's testimony in this area was especially confused.

On the first day of the June 1999 hearing, Mr. Mourfield said that when he first met the OSHA investigator, he had indicated that Mr. Mourfield was the reason he was there and Mr. Mourfield agreed; this exchange occurred in the presence of several supervisors, including both Mr. Heiskell and Mr. Rogers, and several other workers. (TX, p. 333; see also TX, p. 521). However, on the second day of the June, 1999 hearing, Mr. Mourfield stated that Mr. Rogers asked him on December 16, 1998, if he called OSHA, and he had said yes.[81] (TX, p. 403, 409). Mr. Mourfield said Mr. Rogers was already angry when he asked this question. (TX, p. 410). Mr. Mourfield later heard Mr. Rogers tell Mr. Heiskell that he had called. (TX, p. 422).

Mr. Heiskell did not recall ever being told by Mr. Rogers that Complainant had called OSHA. (TX, p. 673). He denied asking anyone if they had called OSHA, and said he was unaware of anyone else asking that question. (TX, p. 673). However, Mr. Plaas testified that he knew on December 16, 1998 that Mr. Mourfield had wanted to see OSHA. (TX, p. 194).

Mr. Plaas agreed that Mr. Mourfield and other workers have a right to speak with OSHA, "but in the right way." (TX, p. 180). Mr. Plaas said he would expect workers to report problems to supervisors first, through the "chain of command," so supervisors can know where the workers are at any given time. (TX, p. 180-81, 249). However, Mr. Plaas denied ever stopping a worker from contacting OSHA, or punishing an employee for reporting an environmental concern, even if the employee went outside of the "chain of command" to do so. (TX, p. 248-49). Mr. Rogers also agreed that Mr. Mourfield had a right to speak with OSHA, but not to leave his work area to look for OSHA around the job site. (TX, p. 592). Mr. Rogers also expected workers to report concerns to supervisors first, so that the company could rectify the problem before going to an outside agency such as OSHA. (TX, p. 603). However, Mr. Rogers also denied that a worker going outside of the "chain of command" would be in trouble (TX, p. 603), and he denied ever telling Mr. Mourfield he could not speak with OSHA. (TX, p. 613).

However, Mr. Heiskell denied that he expected employees to report violations up the "chain of command" before going to government agencies. (TX, p. 711). Mr. Heiskell said if someone else said this was expected, they were making it up; he also denied this expectation was in the job site handbook or in any written instruction to employees. (TX, p. 712). Mr. Heiskell also denied ever telling employees not to volunteer information to OSHA. (TX, p. 711).

IV. Events of December 17-23, 1998

A. Aftermath

Mr. Mourfield testified that after December 16, other workers came said they agreed with and admired what he had done, and thanked him for his actions in trying to insure proper training. (TX,

[81] However, Mr. Mourfield said he could not recall any previous filing in which he made the allegation that Mr. Rogers had asked if he called OSHA. (TX, p. 405, 406-07).

p. 346). However, the workers also warned him he would probably be fired. (TX, p. 346). Mr. Mourfield testified that on December 17, 1998, many of the workers were joking that he and Mr. Rogers would be fighting each other that day. (TX, pp. 412-13).

Mr. Heiskell held a meeting[82] the morning of December 17, 1998 to discuss hostile work environment allegations; he said that after this meeting, he never heard anything about such allegations again. (TX, p. 672). During this meeting, Mr. Rogers and Mr. Mourfield said they had apologized,[83] that everything was fine, and everything was normal again. (TX, p. 532, 672). At the June 1999 hearing, Mr. Mourfield denied he had apologized to Mr. Rogers, but admitted he said that everything was "okay" between them at the meeting December 17, 1998. (TX, p. 412-15). Mr. Mourfield also testified that Mr. Rogers never really apologized to him; Mr. Mourfield said Mr. Rogers found him the afternoon of December 17, and said he was sorry if Mr. Mourfield had misunderstood him, but Mr. Mourfield did not consider this an apology for the firing and yelling at him. (TX, p. 410-11, 416).

Mr. Rogers testified that in the December 17 meeting, Mr. Heiskell said he would handle any problems, and he did not want the men to be intimidated or for any violence or vandalism to personal property to occur. (TX, p. 532-33). Mr. Rogers said the men were mainly concerned about stories of union intimidation on other jobs. (TX, p. 533).

Mr. Mourfield said physical abuse ceased after December 16, 1998, but unfriendly "tones of voices ... [and] dog stares ..." continued, including from Mr. Rogers, even though Mr. Mourfield told the other workers that everything was fine between them. (TX, p. 485-86). Mr. Mourfield described the hostile work environment as "still there but it improved." (TX, p. 1065). Mr. Mourfield said hostile tones and attitudes continued the rest of the week from Mr. Rogers, even though before the events of December 16 he had not unpleasant. (TX, p. 486-87).

Mr. Plaas instructed Mr. Heiskell to investigate the hostile working environment claims by surveying other employees at the Bimbo Cereal site for complaints of or instances of hostility. (TX, p. 857, 1017-19). Mr. Plaas chose Mr. Heiskell to investigate, even though he had no training or experience in such investigations, because he was in charge of the job site. (TX, pp. 857, 1018-1021). Mr. Plaas said it never occurred to him that having a supervisor perform the survey could be a problem, and he never heard any allegation that Mr. Heiskell was also part of a hostile work environment. (TX, p. 251, 883, 903). Mr. Plaas said Mr. Heiskell performed his survey verbally, and thus there was no paperwork (TX, p. 883), but Mr. Heiskell did actually speak to each employee. (TX, p. 1022). Mr. Plaas said he doubts there ever was any hostile work environment. (TX, p. 882).

---

[82] Mr. Smith agreed an "all hands" meeting was held on December 17,1998, and he believes OSHA was discussed, but he did not recall whether any apologies were offered. (TX, p. 65-66).

[83] Mr. Heiskell said he was present when apologies were given. (TX, p. 672).

Mr. Rogers said he was unaware that any teasing of Mr. Mourfield continued after December 17, 1998, and he received no complaints about the work environment that week. (TX, p. 533). However, worker morale was down that week, with some workers scared and others leaving because "they were tired of what was going on."[84] (TX, p. 534). Mr. Heiskell said everything seemed fine during this period, and he heard no complaints from anyone. (TX, p. 674).

B. Lay Off of Mr. Mourfield

Mr. Plaas said that on December 14, 1998, he and Mr. Heiskell discussed manpower needs and lay offs again, and Mr. Mourfield's name was mentioned as one of the men Mr. Heiskell planned to lay off.[85] (TX, p. 836, 1006). Mr. Mourfield was to be laid off because of reductions in the workload, and in keeping with the lay off plan originally discussed with Mr. Plaas in November, 1998. (TX, p. 658-59).

However, Mr. Plaas said he was slightly concerned about laying off a "union organizer," because he was afraid it would be seen as discrimination and he would "get an unfair labor practice suit or something." (TX, p. 836-37). As of December 14, 1998, Mr. Plaas denied knowing Mr. Mourfield had contacted OSHA, was concerned about hostile work environment, had any conflict with Mr. Rogers, or had any concerns about MSDS, HAZCOM training, or posters. (TX, p. 837-38).

One page of Mr. Rogers notes states "Fred [Plaas] called, talked to Kevin [Heiskell] about the union. He said the way to lay off David [Mourfield] and another instead of firing him." (EX-40, p. 3; TX, p. 876-77).[86] Mr. Mourfield claims Plaas, Inc. knew he was a union member several days prior to the date of the note. (TX, p. 1044). Mr. Mourfield believes the note refers to instructions given by Mr. Plaas after Mr. Rogers allegedly fired him on December 16, 1998: lay him off instead of firing him. (TX, p. 1045).

When questioned regarding these notes, Mr. Plaas replied "I can't say I said that particularly." (TX, p. 877). Mr. Plaas denied ever discussing lay offs with Mr. Rodgers, said he never discussed firing anyone, and indicated he only meant it would be better to lay off Mr. Mourfield (as previously

---

[84] Apparently this refers to Mr. Pond, Mr. Atkinson, and Mr. Clampet. (See below for further discussion of these voluntary quits).

[85] Mr. Heiskell made the actual decision to lay off Mr. Mourfield. (TX, p. 675). He thought the rest of the crew could handle the remaining work on the project. (TX, p. 676-77).

[86] Mr. Rogers identified EX-39 and EX-40 as his notes (and a typed transcript) of events on December 16, 17, and 23, 1998. (TX, pp. 540-41). The quoted passage comes from a page dated December 14, 1998, although the opposite page has had December 14 scratched through and replaced with December 16, 1998. (EX-40, p. 3). It is unclear from the notes themselves which date covers this particular passage, as there is no clear continuation from the opposite (and re-dated) page.

planned) with another worker to try to avoid any appearance of discrimination and possible investigation or litigation. (TX, pp. 1024-25). Mr. Plaas said he and Mr. Heiskell only discussed completing the previously planned lay offs, and he told Mr. Heiskell that because the other men had already quit, he was concerned that laying Mr. Mourfield off alone might result in "some kind of a charge ... against us." (TX, p. 835, 1025). Mr. Heiskell only recalled discussing the lay offs of the four men, including Mr. Mourfield; he did not recall Mr. Plaas calling and instructing him to lay off Mr. Mourfield specifically.[87] (TX, p. 731, 744).

Mr. Rogers and Mr. Heiskell both testified Mr. Mourfield was laid off December 23, 1998 in order to complete the previously planned lay off; however, three of the men (Mr. Clampet, Mr. Pond, and Mr. Atkinson) had quit previously.[88] (TX, p. 535, 539; 659, 676, 678). These recent voluntary quits left Plaas, Inc. "welder heavy,"[89] so the decision was made to lay off the next newest welder, Mr. Mourfield; Mr. Rogers said this decision also complied with Mr. Mourfield's request to be laid off before January 22, 1999 so he could make his court date. (TX, p. 536-37). Mr. Rogers said: "The other guys were interested in staying if the job was going to last any longer, and [Mr. Mourfield] needed to be laid off by the 22nd, to be in court on the 26th. And that was how we made the choice." (TX, p. 537). Mr. Heiskell said Mr. Smith was kept on because he still "needed the three welders, and they were the ones I hired first." (TX, p. 678). Mr. Heiskell denied Mr. Mourfield was laid off because he reported possible violations to OSHA; he reiterated that he was laid off as part of reductions in manpower. (TX, p. 684). Mr. Plaas says this was the final part of the originally planned reduction in force, and not for cause. (TX, p. 263).

Mr. Mourfield contends that, based on the workload he saw, there was no reason for any economic based lay off in December 1998. (TX, p. 469). Based on the statements of Mr. Rogers, Mr. Mourfield said the original plan was to keep many of the workers on with new contracts. (TX,

---

[87] Mr. Heiskell said he could not explain Mr. Rogers' note. (TX, p. 767). Mr. Heiskell denied that Mr. Plaas wanted to fire Mr. Mourfield. (TX, p. 745)

[88] Mr. Smith said Mr. Pond quit because he received a lower pay rate than promised, and Mr. Clampet quit because he rode to work with Mr. Pond. (TX, p. 58). Mr. Pond was hired as a helper, but wanted to be a welder; however, he did not want to weld before receiving the raise. (TX, p. 579-80; 609, 628). Mr. Rogers said when he quit, Mr. Pond simply said "it was time to go," and did not explain further. (TX, p. 579). Later, Mr. Rogers acknowledged the dispute over pay could have influenced Mr. Pond's decision. (TX, p. 581). Mr. Atkinson took another job which also hired his wife, but he allegedly mentioned before leaving that he didn't like working with Mr. Mourfield. (TX, p. 535). Mr. Smith said he never heard them mention any concern with unions. (TX, p. 58).

[89] Mr. Rogers' notes of December 22, 1998 indicate that Mr. Plaas had said to go ahead and lay off Mr. Mourfield as Plaas, Inc. was now a "welder heavy." (EX-7, 8). Mr. Heiskell said he tries to keep one welder per fitter. (TX, p. 635).

p. 469). Mr. Mourfield admitted that "in certain situations" it would be expected for a company to hire replacement workers if other quit and the workload remained the same. (TX, p. 471).

Mr. Heiskell chose to lay Mr. Mourfield off December 23rd because "that was a day I come up with the workload we had .... and that was the day that I had planned to lay off." (TX, p. 676). However, Mr. Plaas said lay offs were originally scheduled for December 18, 1998; after Mr. Pond and Mr. Clampet suddenly quit, it was decided to keep Mr. Mourfield for one more week until Christmas. (TX, p. 859). Mr. Plaas said "[Mr. Mourfield] had complained about a hostile working environment and the fact that OSHA had been there on the 16th. I wanted to make sure that everything was fine on that job site; it was a concern of mine." (TX, pp. 1006-07, 1022). Mr. Plaas testified that he learned Mr. Mourfield had actually been laid off at some point between December 23 and 30, 1998. (TX, p. 177).

Mr. Mourfield said he had been given a new assignment the morning of December 23, 1998.[90] (TX, p. 353). Mr. Mourfield and Mr. Smith were walking to a storage trailer for supplies at approximately 3:15 p.m. when Mr. Rogers approached them. (TX, p. 353-54). Mr. Rogers told Mr. Mourfield to gather his personal tools and belongings because he was being laid off. (TX, p. 354). Mr. Rogers then escorted Mr. Mourfield to the Plaas, Inc. trailer, where Mr. Heiskell gave him his evaluation/termination form. (TX, p. 354). Mr. Rogers then escorted him to his vehicle. (TX, p. 354-55). When Mr. Mourfield opened the vehicle door, he said Mr. Rogers stepped in front of him and looked inside, presumably for any Plaas, Inc. property. (TX, p. 355). Mr. Mourfield said other men who quit voluntarily were not escorted off the property, and did not have their vehicles searched. (TX, pp. 355-56).

Mr. Rogers' said he found Mr. Mourfield in the field and explained he would be laid off at the end of the day, and that Mr. Heiskell would have his paperwork. (TX, p. 537). Mr. Heiskell said it was common to lay off workers at about 3:00 p.m., to allow time to gather personal tools and paperwork by the end of the day. (TX, p. 758). Mr. Rogers watched Mr. Mourfield gather his tools, walked him to the office, and walked him out, helping to carry the tools to his vehicle. (TX, p. 537-38). Mr. Rogers denied inspecting Mr. Mourfield's vehicle. (TX, p. 538). Mr. Rogers said he always walked laid off employees off the job site, to be a witness in case the employee tried to claim injury. (TX, p. 538).

Mr. Heiskell said a Personnel Evaluation / Termination form was filled out whenever anyone left Plaas, Inc. employment for any reason. (TX, p. 642-43). Mr. Heiskell usually fills out one form for the worker without comments, and then fills out another form with comments and sends that to Plaas, Inc. headquarters. (TX, p. 643, 645-46). Mr. Heiskell did not explain why he utilized this

---

[90] Mr. Heiskell denied that Mr. Mourfield was in the middle of a series of welds when he was told he was being laid off. (TX, p. 758).

procedure, merely saying "that's just how I did it." (TX, p. 644). Mr. Heiskell identified EX-41 through EX-46 as termination forms he filled out for other employees; Mr. Heiskell said he also gave a copy without comments to those employees, and that he filled out every termination slip in this fashion. (TX, p. 646, 653; see also EX-41 to EX-46). Mr. Plaas said "I don't totally agree with his evaluation termination forms. But that was the way Kevin decided to do it . . . ." (TX, p. 818).

Two different "Personnel Evaluation / Termination Forms" were also prepared when Mr. Mourfield was laid off; Mr. Heiskell filled out both. (TX, p. 643). The copy actually given to Mr. Mourfield on December 23 merely indicates problems with absenteeism and tardiness, but says that Mr. Mourfield did a "good job" and was a "good hand." (See CX-2C). Mr. Mourfield said he would agree with low ratings for absenteeism and tardiness, but disagreed with a low mark for cleanliness.[91] (TX, p. 357). This form also indicated Mr. Mourfield was let go as part of a reduction of force, but did not indicate whether Mr. Mourfield was eligible for rehire. (TX, p. 358). The form was signed by Mr. Heiskell. (TX, p. 358).

CX-2A is apparently a fax copy, sent to Mr. Mourfield's attorney by Respondents' attorneys on or about May 12, 1999. (TX, p. 359-60). This document, while similar to CX-2C, also included comments such as: "at times disrupted job site," and "(union organizer)." (TX, p. 360; CX-2A). In addition, the document indicated Mr. Mourfield was considered not eligible for rehire. (TX, p. 361). CX-2B, apparently the original of CX-2A and intended for internal use only, also had statements that Mr. Mourfield "at times disrupted job site (union organizer)," and indicated he was not eligible for rehire. (CX-2B; TX, p. 361). Mr. Mourfield said he was not given this document when laid off December 23, 1998, and he was not told he was not eligible for rehire. (TX, p. 361). Mr. Heiskell said he never circled either option regarding rehire on the copies given to workers. (TX, p. 645). Again, he could only explain that was how he did it. (TX, p. 645).

Mr. Rogers said the comments about disruption of the job site referred to Mr. Mourfield's "passing out the flyers, going on like this, the union issues," because even though these activities were performed at lunch, the men discussed them during working hours as well. (TX, p. 576). Mr. Rogers testified that the only times Mr. Mourfield was "disruptive" were when he passed out union information before and after work and at lunch, and on December 16, 1998 when he refused to return to work; however, Mr. Mourfield was never "written up" for disruptions. (TX, p. 263, 577, 592). Mr. Rogers denied this referred to Mr. Mourfield raising safety issues, as he "never heard him raise any concerns about safety." (TX, p. 576). Mr. Plaas also said that Mr. Mourfield and Mr. Smith had disrupted the job site December 16, 1998 by walking around looking for OSHA, and "getting in [Mr. Roger's] face." (TX, pp. 205-06). Despite these statements on the form, Mr. Plaas did not know why Mr. Heiskell did not reprimand or "write-up" Mr. Mourfield for these disruptions; he did eventually order Mr. Heiskell to "write up" Mr. Mourfield for excessive absenteeism and tardiness. (TX, p. 263-64).

---

[91] Mr. Rogers confirmed Mr. Mourfield was absent or tardy several times, but said he would rate Mr. Mourfield's work area cleanliness as productivity as average. (TX, p. 554).

Mr. Heiskell explained that the disruption comment referred to the events of December 16, 1998, which upset some of the men and caused a few to quit over the next several days.[92] (TX, p. 658, 689). However, Mr. Heiskell said disruption was not the cause of Mr. Mourfield's lay off. (TX, p. 658). Mr. Heiskell said the "union organizer" comment was based on activity on the job site, which Mr. Heiskell felt showed Mr. Mourfield was a union organizer. (TX, p. 648). Mr. Heiskell said he did not mention Mr. Mourfield and OSHA on the form because when it was filled out, he did not know Mr. Mourfield was involved with the OSHA investigation. (TX, p. 648).

Mr. Heiskell explained a "not eligible for rehire" designation means the person is not to be rehired, but he said that opinion can be reconsidered.[93] (TX, p. 686). Mr. Plaas said this information is placed in a personnel file, and is used when deciding whether to rehire the worker or not. (TX, p. 820). Plaas, Inc. has rehired a number of workers originally marked ineligible for rehire, and Mr. Plaas gave several examples. (TX, p. 820, 825-26). Mr. Plaas said sometimes workers are considered for rehire if they live nearby and are not eligible for per diem, or if it is felt they should be given a second chance. (TX, p. 826). Mr. Heiskell explained Mr. Mourfield was marked not eligible for rehire because he thought Mr. Mourfield's absenteeism and tardiness should be considered before rehiring him. (TX, p. 645). However, Mr. Plaas said he was willing to give Mr. Mourfield a "second chance." (TX, p. 827).

Mr. Plaas admitted that both he and Mr. Heiskell may have used the word "troublemaker" to refer to Mr. Mourfield; Mr. Plaas also said he may have used the term when discussing Mr. Mourfield with Ms. Nardizzi (another OSHA investigator). (TX, pp. 209-10). Mr. Rogers said he did not recall anyone ever referring to Mr. Mourfield as a "troublemaker," and denied he had ever used the word. (TX, p. 555).

Mr. Heiskell did not recall anyone calling Plaas, Inc. headquarters to say Mr. Mourfield had been laid off, or that he had been escorted off the job site. (TX, p. 760-62). Phone records from that day reveal a 0.7 minute call to Plaas, Inc. headquarters at 3:36 p.m.; Mr. Heiskell could not recall the subject of that call, but explained he made frequent calls on a variety of subjects to different people. (TX, p. 761, 764).

Mr. Smith was not laid off with Mr. Mourfield on December 23, 1998, even though he had accompanied Mr. Mourfield throughout the events of December 16, 1998, and he was also allegedly

---

[92] (Mr. Clampet, Mr. Pond, and Mr. Atkinson), but he admitted he did not have any written proof of their reasons for quitting. (TX, p. 658, 689).

[93] For example, Mr. Heiskell said information learned from a subsequent employer could lead to a decision to rehire someone previously marked ineligible for rehire. (TX, p. 687).

fired for several hours on that date.[94] (TX, p. 53, 60, 476-77). However, Mr. Smith testified he was "senior" to Mr. Mourfield at Plaas, as he had been working there longer. (TX, p. 53). Mr. Smith originally began as a welder, and later began working as Mr. Mourfield's fitter;[95] after Mr. Mourfield left, Mr. Smith resumed welding. (TX, p. 273, 275). Mr. Plaas and Mr. Heiskell agreed Mr. Smith was higher in seniority, as well as a good welder, and therefore he was retained when Mr. Mourfield was laid off. (TX, p. 254-55, 678).

At the end of December, Mr. Heiskell said he had two welders (Mr. Smith and Mr. Barry), two fitters, a helper, and himself and Mr. Rogers still working on the site. (TX, p. 678-79). Mr. Heiskell denied that the workload on the remaining workers increased after the layoff of Mr. Mourfield. (TX, p. 677). Mr. Heiskell said the average hours per week either stayed the same or went down from the previous 60 hours per week to about 50 hours, even after voluntary quits and lay offs. (TX, p. 767, 771; see also EX-59). EX-59 shows the week-ending date for each weekly pay period. (TX, pp. 777-78). A review of EX-59 shows the crew still averaged 60 hours per week, with only one week's exception of 70 hours. (See EX-59). Mr. Heiskell said the week after Mr. Mourfield was laid off, total hours were down because of the holidays. (TX, p. 783-84).

V. Filing of Complaints, and Attempts at Settlement

A. OSHA 11(c) Complaint Filed; Ms. Nardizzi's Investigation; Early Attempts at Settlement

Mr. Mourfield filed an OSHA 11(c) whistleblower complaint December 28, 1998.[96] He denied the investigator, Ms. Nardizzi, ever interviewed him or took a sworn statement. (TX, p. 1077). However, Ms. Nardizzi did speak to several of the other witnesses. Mr. Smith testified he spoke with Mrs. Nardizzi in March 1999.[97] (TX, pp. 47-48). Mr. Rogers said he spoke with someone in January 1999, possibly Mrs. Nardizzi, but he could not recall the name; he was asked questions, and a statement was sent for him to review and sign. (TX, p. 558-59). Mr. Heiskell said he spoke with Ms. Nardizzi once by phone, but he was unsure of the date. (TX, p. 692). Mr. Plaas sent her a four

---

[94] Mr. Smith said Mr. Rogers told him December 23, 1998 that he had not attempted to fire him on December 16, 1998, and said that he had been speaking to Mr. Mourfield. (TX, p. 57, 60). Mr. Smith said he felt Mr. Rogers was apologizing to him on December 23, 1998, although the words "apology" or "sorry" were not used. (TX, p. 62).

[95] Mr. Smith said that welders and fitters were paid at the same rate. (TX, p. 274).

[96] Mr. Mourfield alleges Ms. Nardizzi, the OSHA investigator assigned to his complaint, first told him he could not file an OSHA 11(c) whistleblower claim since he was a union member. (TX, p. 364). Mr. Mourfield also filed a complaint of unfair labor practices with the NLRB on January 4, 1999. (EX-25).

[97] Interestingly, Mr. Smith told Ms. Nardizzi he felt Mr. Mourfield was fired or laid off because he was a union organizer. (TX, pp. 47-48).

page letter detailing his version of events. (TX, p. 213).

Mr. Plaas said he first became aware of Mr. Mourfield's OSHA complaint when he was contacted by Ms. Nardizzi December 30, 1998.[98] (TX, p. 1008). She told him a claim had been filed, and that she either had or would speak with Mr. Heiskell (Mr. Plaas was uncertain). (TX, p. 176). Mr. Plaas said he would speak with his superintendent to find out what had happened on the site.

(TX, p. 176). Ms. Nardizzi agreed to contact Mr. Plaas again after the New Year's holiday (TX, p. 177); however, Ms. Nardizzi contacted Mr. Plaas again December 31, 1998, and she said she could settle the complaint for two weeks wages. (TX, p. 178, 890-91). Mr. Plaas said Ms. Nardizzi suggested this figure, and he does not know why she chose that amount. (TX, p. 178, 891). Mr. Plaas spoke to Mrs. Nardizzi again the next Monday, and she reiterated her suggestion to offer a settlement of two weeks pay. (TX, pp. 189-90). Ms. Nardizzi also sent a written settlement agreement to use if Respondents were willing to settle. (TX, p. 214). However, Mr. Plaas told her that after speaking with Mr. Heiskell, he did not feel that his company had done anything wrong. (TX, p. 190). Mrs. Nardizzi indicated that if the parties could not reach a settlement, she would have to proceed to a full investigation. (TX, p. 190).

Mr. Plaas said he has spoken with Ms. Nardizzi at least fifteen (15) times since December 30, 1998. (TX, p. 175, 1009). He denied that Mrs. Nardizzi ever asked for any "favors." (TX, p. 213). Mr. Plaas said Ms. Nardizzi acted as a sort of mediator, and Plaas, Inc. offered some money, and eventually reinstatement to Mr. Mourfield, in an attempt to settle. (TX, p. 1009-1010). Mr. Plaas could not recall telling Ms. Nardizzi anything he may have said regarding reinstating Mr. Mourfield. (TX, p. 890). Mr. Plaas denied he said he would not reinstate Mr. Mourfield, and again denied that he was extremely angry at him.[99] (TX, p. 179, 191). Mr. Plaas said his company has been faced with litigation before, primarily NLRB charges, and he was used to such investigations. (TX, p. 191).

B. Mr. Smith Quits; Possible Return of Mr. Mourfield

Mr. Smith announced in early January 1999 that he was quitting to take a job nearer his home. (TX, p. 679). This left only one welder on site, which was one welder short of what Mr. Heiskell felt he would need to finish the job. (TX, p. 679, 860). Mr. Heiskell said he wanted to rehire Mr. Mourfield because he needed another welder, his welding was good, there was only a short time left

[98] Mr. Plaas said he has never met Ms. Nardizzi in person. (TX, p. 215).

[99] Mr. Plaas admitted he was "upset" over events at the job site and the litigation. (TX, p. 179). Mr. Plaas also indicated he was "upset" over the disruption caused by Mr. Mourfield on December 16, 1998, which caused "nonproductivity." (TX, pp. 179-80, 182). However, Mr. Plaas has consistently denied that he was angry with Mr. Mourfield specifically.

on the site, and it was difficult to recruit workers from outside the local area.[100] (TX, p. 688, 707, 770). Mr. Plaas chose to offer the open position to Mr. Mourfield. (TX, p. 251, 800, 859-60; CX-5B, EX-10).

Mr. Heiskell said he did not think anyone was upset over the possibility of Mr. Mourfield's return, including Mr. Rogers. (TX, p. 691, 714). However, Mr. Plaas admitted "morale on the job site didn't want [Mr. Mourfield] to come back ... but I insisted that he would come back." (TX, p. 888). Mr. Plaas said "for the amount of time ... that was left on this project, I didn't have a problem with putting him back to work." (TX, p. 889). Mr. Rogers said he did not want to bring Mr. Mourfield back because he wanted things done with, he did not want "the problems to be brought back up," and it was all "just a big headache by then." (TX, p. 565-66). Mr. Rogers admitted hoping "in a sense" that Mr. Mourfield would refuse to return, "because I didn't want the issues to be brought back up." (TX, p. 568). However, Mr. Rogers also thought that if Mr. Mourfield were re-hired, he might drop the complaint against Plaas, Inc.[101] (TX, p. 567-68). Mr. Rogers had no real input into the decision, other than simply to give his opinion, because "it wasn't my call." (TX, p. 608).

Despite the possibility of rehiring him, Mr. Mourfield's termination form on file at Plaas, Inc. headquarters apparently was never modified to say Mr. Mourfield was eligible for rehire, and as of the June 1999 hearing, Mr. Mourfield was probably still listed as ineligible for rehire. (TX, p. 689, 746-47). Even so, Mr. Heiskell said if called by another company, he probably would say Mr. Mourfield was eligible for rehire and had done a good job. (TX, p. 689). Mr. Heiskell actually was contacted between December 23, 1998 and January 20, 1999 by two other companies where Mr. Mourfield apparently had applied for work; he denied he told them that Mr. Mourfield had an absenteeism problem or that he was ineligible for rehire. (TX, p. 687, 746). Mr. Heiskell said he told the companies that Mr. Mourfield "was a good hand and a good welder." (TX, p. 746). Mr. Heiskell also denied ever giving a bad reference for Mr. Mourfield. (TX, p. 768).

On January 16, 1999 Mr. Rogers recorded in his notes[102] that Mr. Joe Stafford had expressed concern that Mr. Mourfield might fake an injury to get money from Plaas, Inc. (TX, pp. 561-63). Mr. Rogers said the discussion arose because of talk on the job site about rehiring him. (TX, p. 563). Mr. Heiskell said he never heard Mr. Rogers mention the suspicion that Mr. Mourfield might fake injury. (TX, p. 714). Mr. Heiskell said he did not think Mr. Mourfield would do that, that he was an honest person and a good worker, and anyone who would say otherwise was mistaken. (TX, p. 714).

---

[100] Mr. Heiskell said there were no other former Plaas, Inc. welders in the area at the time. (TX, p. 768).

[101] Mr. Heiskell denied Mr. Mourfield was offered reinstatement because he had filed an OSHA complaint. (TX, p. 691-92).

[102] The court also presumes this was recorded in portions of Mr. Rogers notes not formally submitted as exhibits.

Mr. Mourfield called at one point in January and said he might return, but he would have to speak with his attorney first. (TX, p. 680-81). Mr. Heiskell said he was never sure, but he thought Mr. Mourfield probably would return. (TX, p. 681). Mr. Rogers noted in his journal that Mr. Mourfield did not appear for work on January 16, January 19, or January 20, 1999, so Mr. Clampet was contacted, and would be at work January 22, 1999. (TX, p. 577-78). Mr. Rogers said he made these notes because he thought the job had been offered to and accepted by Mr. Mourfield, who then had not shown up, and Plaas, Inc. still needed another welder to replace Mr. Smith. (TX, p. 608-09).

C. More Negotiations; Breakdown of Talks; Rehire of Mr. Clampet

Plaas, Inc. tried to contact Mr. Mourfield by telephone and letter to offer him the open position, along with at least some back pay, as part of a settlement of his complaint. (TX, p. 251-252, 570, 608, 680, 860). Mr. Plaas said he gave Mr. Mourfield the opportunity to return "at least four or five times; Mr. Plaas wrote to offer re-employment three times, and a certified letter[103] was sent from Mr. Heiskell. (TX, p. 860, 882). Mr. Plaas said he felt settlement negotiations eventually broke down over Mr. Mourfield's demand for approximately $1,500.00 in attorney's fees. (TX, p. 252).

A number of letters evidencing settlement negotiations are present in the record. On January 13, 1999, Mr. Plaas sent a letter to Mr. Mourfield which indicates Mr. Smith's welding position was open, and Plaas, Inc. had been unsuccessful in trying to contact Mr. Mourfield by phone. (CX-5B, EX-10). On January 14, 1999, Mr. Mourfield's counsel sent a letter to Ms. Nardizzi, offering to settle the matter on the following terms: (1) reinstatement as a welder, effective January 15, 1999, with non-discriminatory terms and conditions in a non-hostile work environment; (2) total back pay of $3,910.00; (3) purging of any derogatory information related to his termination from his personnel records; (4) posting of up-to-date posters and OSHA contact information; (5) settlement of his OSHA 11(c) claim and release of his rights to file an environmental whistleblower claim; (6) attorney fees of $1575.00, plus expenses of $17.55. (EX-14; TX, p. 1071).

Several letters were exchanged by fax on January 15, 1999. Mr. Mourfield faxed a letter directly to Mr. Plaas acknowledging receipt of Mr. Plaas' offer of re-employment, but indicating he was waiting for a response to the detailed settlement offer sent by his attorney previously; in addition, he also said "I do look forward to resolving these issues and returning to work for your company." (CX-14; see also TX, p. 881). Attached to this letter was a copy of the offer sent to Ms. Nardizzi previously (CX-14; see also EX-14). Mr. Plaas responded that he found the proposed settlement "very unreasonable and simply [could] not accept this offer"[104]; in response, he offered to rehire Mr. Mourfield and to provide "some back wages." (CX-5C, EX-11). Mr. Mourfield's counsel then sent

---

[103] Mr. Heiskell he did not know whether Plaas, Inc. usually made offers via certified letter; he also said he knew of no other intensive effort to rehire a man previously marked ineligible for rehire. (TX, p. 687-88). Mr. Plaas said he could not recall ever sending a certified letter to offer a rehire before. (TX, p. 899).

[104] Mr. Plaas apparently believed that the requested attorney fees were for the preparation of a single letter. (TX, p. 1016-17).

another settlement offer to Mr. Plaas, with only the following changes from the previous offer: (1) reinstatement effective January 18, 1999; (2) total back pay of $4,490.00; (3) attorney fees of $1,650.00, plus expenses of $18.31; this offer was pre-signed by Mr. Mourfield. (EX-15).

On January 16, 1999, Mr. Mourfield's counsel again sent a letter to Mr. Plaas, responding to Mr. Plaas' letters of January 13, and January 15 (which he had apparently just received). (EX-16). Counsel first objected that Mr. Plaas had contacted Mourfield directly instead of proceeding through his counsel. (EX-16, p. 1). Counsel then indicated his understanding (through Ms. Nardizzi) that Mr. Plaas had accepted the previous settlement offer, with the exception of attorney fees; however, his counsel was angry because Mr. Plaas' letter of January 15 indicated the proposal was now "unreasonable."[105] (EX-16, p. 1). Counsel closed by suggesting that Mr. Plaas sign the settlement, propose modifications, or make a counter-offer. (EX-16, p. 1).

On January 18, 1999, Mr. Plaas sent another letter directly to Mr. Mourfield. (EX-12). In this letter, Mr. Plaas said that Mr. Mourfield's efforts to return to work "appear to be nothing more than a stall tactic." (EX-12, p. 1). Mr. Plaas said that on January 7, 1999, Ms. Nardizzi had offered Mr. Mourfield back pay through January 22, 1999, the date he had requested he be laid off anyway, with no need to return to work; however, instead of accepting this offer, Mr. Mourfield had "chose[n] to seek council [sic]." (EX-12, p. 1). Mr. Plaas also said that since January 7, he had agreed "to the acceptable OSHA terms only in the settlement agreement (dated January 14, 1999) that were presented to Mrs. Nardizzi, (reinstatement and back pay through January 15, 1999.)" (EX-12, p.1). Mr. Plaas closed by again accusing Mr. Mourfield of stalling, and said that further negotiations were pointless, and that he would recommend that the investigation proceed. (EX-12, p. 1).

Finally, on January 19, 1999, Ms. Nardizzi faxed a settlement agreement to Mr. Plaas. (EX-18). This document primarily provided for the following: (1) back pay of $3,330.00, minus normal deductions; (2) purging of Mr. Mourfield's record of any derogatory references related to this action; (3) $1,650.00 in attorney fees, plus $18.31 in expenses; (4) reinstatement as of January 15, 1999. (EX-18, p. 2). Less than half an hour after receiving this document, Mr. Plaas declined, saying he has never agreed to pay attorney fees in any proposed settlement, and his understanding was that such fees are not permissible under an OSHA 11(c) complaint. (EX-19).

Mr. Plaas said he did not feel that attorneys needed to be involved during these negotiations because Ms. Nardizzi was doing a good job. (TX, p. 1012). However, Mr. Plaas denied being angry or that he stopped offering re-employment after Mr. Mourfield had hired an attorney; he pointed out that several offers of re-employment were made during the same time he was receiving letters from

---

[105] Mr. Mourfield said a statement in EX-16 (that the only remaining issue is attorney fees) is incorrect because Ms. Nardizzi falsely reported Mr. Plaas had accepted the other terms, and his counsel was therefore incorrect when he said this was the only remaining issue because he relied on "falsified information from a federal agent." (TX, p. 1068-1070).

Mr. Mourfield's attorney.[106] (TX, p. 882, 884, 1027). Mr. Mourfield's proposed settlements of January 14 and 15, 1999 (EX-14, 15) also offered to release Mr. Mourfield's rights to file an environmental whistleblower claim under various federal statutes. (See EX-14 and EX-15, item 3; TX, p. 1013-14). However, Mr. Plaas refused to say he knew, based on these settlement offers, that Mr. Mourfield was asserting an environmental whistleblower claim, because Ms. Nardizzi was still working on a possible settlement. (TX, p. 1013-14).

Mr. Plaas said he felt he had reached an agreement to a settle, except for the question of attorney's fees (TX, p. 1010); he pointed out that EX-16, a letter from Mr. Mourfield's counsel, indicates attorney fees are the only remaining issue. (TX, p. 1012-13). However, Mr. Plaas said he did not know exactly how much back pay he would have been willing to give Mr. Mourfield, but that he was willing to provide back pay at least through January 15th, 1999. (TX, p. 882, 903). In contrast, Mr. Mourfield's settlement offer of January 14, 1999 (EX-14) requested $3,910.00 in total back pay, based on an exhibit attached to the letter that Mr. Mourfield had prepared himself. (TX, p. 1071-72). The next day, he sent another offer requesting back pay of $4,490.00, and reinstatement on January 18, 1999. (EX-15). Mr. Mourfield was unsure how many days back pay Ms. Nardizzi asked him to agree to, but said she once suggested two days, and another time about ten days. (TX, p. 1077). Mr. Mourfield admitted he was at least offered "some" back pay by Mr. Plaas, but said no firm numbers were ever offered. (TX, p. 481).

Mr. Mourfield said he chose not to return to Plaas, Inc. because he was never promised a return to a non-hostile working environment,[107] nor was he ever offered full back pay. (TX, p. 362, 1067, 1074). Mr. Mourfield also said there was a remaining dispute over attorney fees. (TX, p. 475). Mr. Mourfield admitted he was offered reinstatement to Plaas, Inc. several times. (TX, p. 473). Mr. Mourfield denied receiving an offer through Mrs. Nardizzi to return on January 15, 1999 with full back pay through January 15, 1999. (TX, p. 474). Mr. Mourfield also said Mr. Plaas never wrote that he had agreed to pay back pay using Mr. Mourfield's calculations. (TX, p. 1074).

After the exchange of offers in mid-January, 1999, Mr. Plaas concluded Mr. Mourfield was not really interested in returning and chose to offer the position to Mr. Clampet. (TX, p. 253, 218, 800, 880, 884). Mr. Plaas also offered the position to him because: the remaining work was short-term, Plaas, Inc. still needed another welder to complete the work, and Mr. Clampet was both local and the last welder to leave before Mr. Mourfield's lay off. (TX, p. 219, 885, 1012). Mr. Plaas told

---

[106] Mr. Plaas said he did communicate directly with Mr. Mourfield's attorney. (TX, p. 1010). Presumably the implication is that Mr. Plaas knew Mr. Mourfield had hired counsel, but continued to negotiate, thus showing he did not break off talks simply because Mr. Mourfield retained counsel.

[107] Mr. Plaas said after Mr. Heiskell's investigation, he determined there never was a hostile work environment. (TX, p. 882). Mr. Plaas seemed to evade a question about what the harm would be in agreeing to a non-hostile environment if there never was one in the first place. (TX, p. 882).

Mr. Clampet Mr. Mourfield had refused the job, and Mr. Clampet was the next former welder in line.[108] (TX, p. 886). Mr. Plaas denied he told Mr. Clampet he was hired instead of Mr. Mourfield because Mr. Mourfield was a troublemaker and union member who had called OSHA. (TX, p. 220, 888). Mr. Mourfield denied telling Mr. Clampet that he did not want a job at Plaas, Inc. again. (TX, p. 475).

Mr. Plaas said he last spoke with Mrs. Nardizzi prior to Mr. Mourfield's filing of his environmental whistleblower complaint. (TX, p. 215). After he filed this complaint, Respondents chose to obtain counsel; prior to that time, Mr. Plaas had handled everything personally. (TX, p. 211).

D. Miscellaneous Subjects

Mr. Heiskell said not all the Plaas, Inc. welders remained working on the site for months afterward. (TX, p. 772). In January 1999, only 2 welders, 2 fitters, and a helper remained on the site, including welders Barry Richmond and Mr. Smith (eventually replaced by Mr. Clampet), both of whom were "senior" to Mr. Mourfield at the time of his lay off. (TX, p. 543-44). Mr. Plaas said some workers remained into February to finish up the main contract, to work on a new bid for cistern piping, and possibly to work on some other small contracts he did not recall. (TX, p. 792-93).

Eventually, all Plaas, Inc. workers were laid off until only Mr. Heiskell and Mr. Juan Campos remained on the job from mid-March through April 16, 1998. (TX, p. 160, 227, 788-89). Mr. Heiskell was finally laid off in mid-April as the work finished. (TX, p. 615, 901). On April 16, 1999, Plaas, Inc. removed all of its trailers and equipment from the site. (TX, p. 160, 227, 789). On April 24, 1998, Mr. Heiskell returned for approximately three weeks, and then hired three other men to help correct problems with the bottom of the steep tanks.[109] (TX, p. 160, 228, 779). Plaas, Inc. was called back under a separate contract to fix these problems which were revealed during Bimbo Cereal's "start up" of the plant. (TX, p. 793-94). At the time of the hearing in June 1999, there were only three or four Plaas, Inc. workers on the Bimbo Cereal site; Mr. Plaas explained this work was not part of the original contract, which had "wound down around the end of January." (TX, p. 788, 792). Mr. Plaas said he knew of only one welder currently working at the Bimbo Cereal site as of the June 1999 hearing, who brought in his own welding equipment on a truck, because Plaas, Inc. had previously removed most of its equipment. (TX, p. 796).

Mr. Plaas said Mr. Heiskell's last day of work on the Bimbo Cereal site was June 18, 1999.

---

[108] Mr. Plaas admitted he does not usually talk with one worker about another, but said he mentioned this because Mr. Clampet knew Mr. Mourfield also was a local resident. (TX, p. 887). Mr. Smith also testified he spoke with Mr. Clampet, and Mr. Clampet said he was told Mr. Mourfield, had refused the offer. (TX, p. 270, 272).

[109] Plaas, Inc. was re-hired to correct a flaw in the original design of the piping. (TX, pp. 160-61). Mr. Plaas said only one of the newly hired hands was a welder. (TX, p. 162).

(TX, p. 998). Mr. Plaas said Plaas, Inc. was not doing any work in Texas at the time of the September 1999 hearing. (TX, p. 1000). Mr. Plaas also said none of the workers from the Bimbo Cereal site were still working for Plaas, Inc. (TX, p. 1007-08).

VI. Damages & Mitigation

A. Mental, Emotional, and Financial Stress

After he was laid off, Mr. Mourfield said he felt scared because it was Christmas and he had three children to support. (TX, p. 364). Based on Mr. Rogers' alleged promise of long-term employment,[110] he had also promised special trips and purchases to his family. (TX, p. 366-67). Mr. Mourfield said it was a difficult financial decision to proceed with his case, but he felt he had to "do what's right," and to show the other workers he would not give up. (TX, p. 1037-39). However, this decision has taken away from his family financially,[111] and caused him stress. (TX, p. 1038). Mr. Mourfield wants Respondents to be held responsible for what has happened to him and his family. (TX, p. 366).

Mrs. Mourfield testified in September 1999 that she and Mr. Mourfield have been married for eight years; when she first met him he was "a really nice, fun-loving person." (TX, p. 1079, 1093). She said Mr. Mourfield was "very upset" when he came home December 23, 1998; he was not angry, but he was confused and felt he had been treated wrongly. (TX, p. 1080). Mrs. Mourfield also said Christmas was difficult, because Mr. Mourfield was "just real upset... [and] he wasn't really into the spirit." (TX, p. 1080). She said he continues to get upset and worry whenever any new paperwork comes in about his case. (TX, p. 1083).

Since the events of December 1998, Mr. Mourfield has been "depressed and quiet." (TX, p. 1080, 1094). However, in response to questions about him having a previous history of depression, she said "I wouldn't necessarily call it depression ... [and] I can't say for sure that he has ... depression." (TX, p. 1094). She said he did take medication "for a disorder, but not for depression."[112] (TX, p. 1094). Mr. Mourfield said he takes medication for panic attacks, which have increased since the events with Plaas, Inc. (TX, p. 345-46). Mrs. Mourfield confirmed Mr. Mourfield

---

[110] However, Mrs. Mourfield said he has worked construction for seven years, and has held "very many" jobs during that time, as it is common for construction jobs to end. (TX, p. 1090).

[111] Mrs. Mourfield was not working at the time of the lay-off or at the time of hearing. (TX, p. 365).

[112] Questions in this area were cut-off by the court after Mr. Mourfield alleged Respondents may have obtained confidential information from a previous employer, in violation of a settlement agreement and protective orders in that case. This has been addressed in more detail in the court's previous April 5, 2000 Order on Pending Motions.

previously suffered from panic attacks, and that they have increased recently. (TX, p. 1082-83).

Mrs. Mourfield said her family and marriage have suffered stress too. (TX, p. 1081-82). Mrs. Mourfield said going forward with the case has been hard, even though she considers what he is doing "a wonderful thing." (TX, p. 1080). Prosecuting the case has caused Mr. Mourfield to withdraw from his family, and to spend time away from home. (TX, p. 1081). The children have not had as much time with their father, and they don't understand his change of mood. (TX, p. 1081). She also said the family has reduced income, and no health insurance. (TX, p. 1081).

Mr. Mourfield said he has had family medical expenses for his wife and children. (TX, p. 1037). Mrs. Mourfield said the family has no insurance to cover these unexpected medical expenses. (TX, p. 1082-83). Mr. Mourfield never had health insurance while working for Plaas, Inc., but was "just a few days away from getting it."[113] (TX, p. 367, 1084)

B. Other Employment

At the time of the June 1999 hearing, despite efforts to find work in construction and other fields, Mr. Mourfield said he had been generally unsuccessful in finding alternative employment. (TX, p. 365, 369). Since the lay-off, he has worked only four weeks, for A, B & C & C Contractors in March and April 1999, and he was not working at the time of the hearing in June, 1999.[114] (TX, p. 365, 368-69, 1036-37). Mrs. Mourfield confirmed he had only worked as a welder for about 5 ½ weeks since the lay off, but said that he applies for work "quite often." (TX, p. 1085, 1092). She also testified Mr. Mourfield had worked at a local hardware/home improvement store for two months prior to the hearing in the plumbing department.[115] (TX, p. 1085, 1088). The court notes that Mr. Mourfield failed to mention this employment in his own testimony.

---

[113] Mrs. Mourfield did not know the eligibility period was for health insurance through Plaas, Inc. (TX, p. 1084-85). Mr. Rogers said Plaas, Inc. does offer medical insurance to employees, but only after a certain number of hours or days are worked. (TX, p. 583). Mrs. Mourfield said they also were not eligible for union health insurance because "you have to work so many hours with the union." (TX, p. 1085).

[114] Mr. Mourfield said he also worked less than one week for a company that went bankrupt, but was never paid. (TX, pp. 484-85).

[115] When asked if he had worked anywhere else, she looked to Mr. Mourfield, and Respondents' counsel objected that he was shaking his head. The court then warned Mrs. Mourfield not to look for help in answering questions. She indicated she did not want to answer the question, but was ordered to by the court. Mr. Mourfield then objected that by answering this question he might be subjected to blacklisting and lose the job. The court agreed to order Respondents not to contact his current employer; Respondents agreed to so comply. (TX, p. 1085-1087).

At the time of the June 1999 hearing, Mr. Mourfield said welder unemployment was high in the area. (TX, p. 365). At the September 1999 hearing, Mrs. Mourfield said Mr. Mourfield has applied for work "numerous"times, and that a hundred times "would be a safe assumption." (TX, p. 1093). Despite this volume of applications, she testified he had been unable to locate any work other than the positions previously described. (TX, p. 1093). Local union official Mr. Don Green said there were about 300 members in Plumbers and Steamfitters Local Union 196, some of whom are welders; of this total, he said only 15 to 20 were not working.[116] (TX, p. 907). Mr. Green agreed that "work's good now," but he refused to characterize unemployment in the area as extremely low. (TX, p. 907-08). Mr. Green said he has been attempting to find Mr. Mourfield a job, and has had some success. (TX, p. 908). However, Mr. Green said Mr. Mourfield had only been employed about four weeks. (TX, p. 909).

Mr. Mourfield said "there's no doubt in my mind that I've been blacklisted." (TX, p. 1038). He said this blacklisting occurred on his separation notice (CX-2B), which lists him as a "union organizer," and a "troublemaker." (TX, p. 1038-39). Mr. Mourfield also alleged that Mr. Rogers notes (EX-40, p. 3) show he has been blacklisted as well. (TX, p. 1039).

At the time of his layoff, Mr. Mourfield was earning $17.00 per hour, plus a per diem of $35.00 per day.[117] (TX, p. 729). Mr. Heiskell said these rates were still correct as of the June 1999 hearing. (TX, p. 729). Mr. Green said the current union wage rate in the Amarillo area was $18.10 per hour, plus a $3.50 benefit package. (TX, p. 922). Mr. Green said the non-union rate varies from job to job. (TX, p. 923). Mr. Mourfield has been keeping calculations of back pay and offsets. (TX, p. 1037).

DISCUSSION

I. Burdens of Production and Proof

To reiterate, the court has jurisdiction only over the environmental whistleblower claims raised by Mr. Mourfield, not over possible OSHA whistleblower or unfair labor practice violations. (See note 4, *supra*).

To make an environmental whistleblower prima facie case, Mr. Mourfield must:

a. show that he engaged in "protected activity";
b. show that he was subject to an "adverse employment action";

---

[116] Mr. Green admitted that some of the men may not want to work. (TX, p. 908). Mr. Mourfield and other "traveling members" are not included on out of work lists. (TX, p. 909).

[117] The transcript lists this as $35.00 per hour, but the court has assumed the correct amount is $35.00 per day.

c. show that Respondents' were aware of the protected activity when the adverse action was taken;
d. raise at least an inference that the protected activity was the likely cause of the adverse action.

If successful, Respondents may then rebut the inference that the protected activity motivated the adverse action by showing that the adverse action was motivated by some legitimate, non-discriminatory reason. Mr. Mourfield then must demonstrate that the proffered reason was not the true reason for the adverse employment action. (See generally, p. 3, *supra*).

II. Credibility Observations

Before addressing the merits of each element of the case, the court will briefly comment on the credibility of the witnesses. Mr. Mourfield has questioned the credibility of Respondents' witnesses by raising both direct challenges to their credibility,[118] and pointing out inconsistencies in their testimony.[119] Similarly, Respondents' witnesses tried to cast doubt on Mr. Mourfield's credibility directly,[120] or testified to events in direct contravention to Mr. Mourfield's testimony. The court feels it has adequately pointed out most instances of conflicting testimony in the summary of the evidence above, and will highlight several of these instances in the discussion below. However, based on all of the evidence, and its own direct observations of the witnesses, the court finds no reason to discredit the entire testimony of any witness. The court found all of the witnesses to be generally credible, with the exceptions noted above.

III. Prima Facie Case

A. Protected activity

1. Standards/Caselaw

---

[118] For example, Mr. Rogers said Mr. Plaas paid for his hotel room and lost wages so he could testify at the hearing, and he said Mr. Plaas reiterated a previous offer to rehire him on other Plaas, Inc. projects. (See, e.g. TX, pp. 131, 495, 551-53, 602, 868).

[119] For example, Mr. Heiskell, Mr. Rogers, and Mr. Plaas all testified that no one was fired December 16, 1998; but later Mr. Heiskell said "that was the day – yes – they were fired." (TX, p. 704).

[120] Mr. Rogers said did not consider Mr. Mourfield to be an honest person, citing an example of Mr. Mourfield offering to sell police handguns, but refusing to have his name listed on a bill of sale. (TX, pp. 556-57).

For the court to find an employee engaged in protected activity, the employee must demonstrate that he complained of at least a "reasonably perceived" violation of the underlying environmental statute or regulations. See Abu-Hjeli v. Potomac Power Co., 89-WPC-1 (Sec'y Sept. 24, 1993); Johnson v. Old Dominion Security, 86-CAA-3, 4, 5 (Sec'y May 29, 1991). Protection is only provided for employees making complaints "grounded in conditions constituting reasonably perceived violations" of environmental laws, not for an employee's mere subjective belief that the environment might be affected. See Kesterson v. Y-12 Nuclear Weapons Plant, 95-CAA-12 (ARB Apr. 8, 1997); Crosby v. Hughes Aircraft Co., 85-TSC-2 at 11 (Sec'y Aug. 17, 1993). As the Secretary explained in Crosby, "[the employee] had to have a reasonable perception that [Respondent] was violating or about to violate the environmental acts." Crosby at 11. However, it is not necessary that the employee prove any actual environmental violation occurred. See Crosby at 11 (citing Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 357 (6th Cir. 1992)). The "reasonably perceived" inquiry often involves questions of the risk of environmental violation or release, and whether the risk was too remote or speculative to constitute a reasonably perceived risk. For example, in Crosby, the Secretary found that the possibility of environmental harm described by the complainant required many speculative assumptions, and that these assumptions were "both too numerous and too speculative for him reasonably to have perceived that [respondent] was about to violate one of the environmental acts." Crosby at 12.

It is also important to note that an employee does not engage in "protected activity" merely by witnessing (actual or perceived) violations of environmental law. An employee must not only reasonably perceive a violation, but must take some action to report or "blow the whistle" on the violation prior to the adverse employment action. See Kahn v. Commonwealth Edison Co., 92-ERA-58 (Sec'y Oct. 3, 1994) (complaint filed with the NRC *after* the adverse activity was not protected activity). Thus, no matter the severity of the actual or perceived environmental violation, an employee does not receive whistleblower protection by reporting a violation only after he has already been subjected to the adverse employment activity.

Internal complaints generally are protected under the whistleblower provisions of the pertinent environmental statutes. See Hermanson v. Morrison Knudsen Corp., 94-CER-2 (ARB June 28, 1996); Guttman v. Passaic Valley Sewerage Comm'rs, 85-WPC-2 (Sec'y Mar. 13, 1992), slip op. at 11; Wagoner v. Technical Products, Inc.,87-TSC-4 (Sec'y Nov. 20, 1990), slip op. at 8-12; Willy v. The Coastal Corp., 85-CAA-1 (Sec'y June 4, 1987), slip op. at 3; Keith E. Conaway, 91-SWD-4 (Sec'y Jan. 5, 1993). In West v. Systems Applications International, 94-CAA-15, p. 4 (Sec'y Apr. 19, 1995), the Secretary held that an internal complaint is a protected activity under the Clean Air Act.

However, an employee's complaints about occupational safety and health generally are not protected by environmental whistleblower law: "Worker protection for whistleblowing activities related to occupational safety and health issues is governed by Section 11 of the Occupational and Safety and Health Act, 29 U.S.C. §§ 651-678 (1988), and enforced in United States Federal District Courts, not within the Department of Labor's administrative adjudicatory process." M.C. Tucker v.

Morrison and Knudson, 94-CER-1 at 5 (ARB Feb. 28, 1997); see also Minard v. Nerco Delamar Co., 92-SWD-1 (Sec'y Jan. 25, 1995) slip op. at 8; Aurich v. Consolidated Edison Co. of New York, Inc., 86-CAA-2 (Sec'y Apr. 23, 1987) slip op. at 3-4. As the ARB has said, "[t]he distinction between complaints about violations of environmental requirements and complaints about violations of occupational safety and health requirements is not a frivolous one." M.C. Tucker at 5. An employee who complains of occupational safety and health concerns will not receive environmental whistleblower protection unless his claims implicate environmental law as well by "touch[ing] upon" public safety and health. See Sawyers v. Baldwin Union Free School District**,** 85- TSC-1, note 12 (Sec'y Oct. 24, 1994), (citing Aurich slip op. at 4); Scerbo v. Consolidated Edison Co. of New York, Inc., 89-CAA-2, p. 4 (Sec'y Nov. 13, 1992).

2. Expert Testimony of Mr. Tod Rockefeller

Mr. Tod Rockefeller[121] testified at the September 1999 hearing. He holds a graduate degree in environmental science and a degree in biology, including "one specific course in environmental pollution," and a few other "related" courses. (TX, p. 953, 955; CX-15A). Mr. Rockefeller also attended a four day workshop and took a two hour exam to receive certification from the Institute of Hazardous Materials Management, sponsored by the Institute of Hazardous Material Managers and the Association of Certified Hazardous Material Managers. (TX, p. 955-56; CX-15B). He was tendered as an expert in hazardous wastes, hazardous materials management, and environmental management; Respondents objected, and were allowed to follow-up post-hearing. (TX, p. 957).

Mr. Rockefeller admitted he never went to the Bimbo Cereal site. (TX, p. 974). His testimony was based on a sheet of facts from Complainant's counsel, and a telephone conversation with Mr. Mourfield; all of his information came from "a description and this one page." (TX, p. 959, 965). He denied an opinion was suggested to him, and said he was merely asked to review the information and provide his opinion. (TX, p. 980). Mr. Rockefeller admitted his opinion could change if facts were misrepresented, but this would depend on which facts. (TX, p. 981-82).

Although the court allowed the testimony of Mr. Rockefeller as an expert, after reviewing his testimony, the court will give it little weight. Mr. Rockefeller never visited the site in question, never did any testing, and relied on a single fax (excerpted from Complainant's PFFCL) and on one (or more) phone conversations with Mr. Mourfield. Mr. Rockefeller is a whistleblower himself, represented by the same counsel as Mr. Mourfield. In sum, the court feels Mr. Rockefeller provided guesses based on scanty information from possibly biased sources.

3. Alleged Incidents of Protected Activity

---

[121] Mr. Rockefeller acknowledged Mr. Mourfield's counsel is his attorney in a whistleblower case against the Department of Energy (on appeal at the time of this hearing). (TX, p. 974-75). Mr. Rockefeller denied the case had been dismissed for making unfounded allegations. (TX, p. 976).

Mr. Mourfield's filings primarily focused on perceived violations, failing to address what "whistleblowing" activity, if any, Mr. Mourfield took in response. Thus, the court has done its best to separate out each possible instance of protected activity. These incidents will be discussed in a somewhat different order than described above.

Mr. Mourfield's own expert, Mr. Rockefeller, said most of the issues described "seemed to deal with OSHA issues to me"; however, he said at least two seemed to implicate the Resource Conservation and Recovery Act, the Clean Air Act, and the Clean Water Act. (TX, p. 959, 965; see below for details). Mr. Rockefeller also felt that the TSCA, CERCLA, SDWA, and FWPCA could be at issue, but he could not answer definitively without more information. (TX, p. 967).

a. Prior to December 16, 1998

i. Argon Leaks

Mr. Mourfield alleged that his concerns about argon leaks were protected activity. (See Complainant's Amended PFFCL 100(g)-100(m)). However, prior to December 16, 1998, the court finds only one instance of Mr. Mourfield actually reporting leaking argon gas.[122] Mr. Mourfield testified that shortly after he was hired, Mr. Rogers approached him regarding his apparent wasteful use of argon gas; Mr. Mourfield demonstrated that the equipment Plaas, Inc. provided was damaged or faulty, and that the supply hoses leaked almost constantly. (TX, pp. 1034-36). Under Hermanson v. Morrison Knudsen Corp., 94-CER-2 (ARB June 28, 1996), and the other cases cited above, reports to a foreman are an internal complaint and could be protected activity, if the report is of a "reasonably perceived violation" of environmental law.

The submitted MSDS lists the hazards of argon gas as asphyxiation[123] and the possibility of cylinder rupture (due to damage, over-pressurization, or high temperature). (See CX-4B). The court finds nothing on the MSDS about any environmental or pollution hazard, and notes that the MSDS states "no adverse ecological effects expected." (CX-4B, p. 4). Regardless of the actual (hazardous or non-hazardous) nature of argon gas, the proper inquiry is "whether under the circumstances it was reasonable, given [Mr. Mourfield's] training and experience, for him to believe that [leaking argon

[122] Based on Mr. Mourfield's testimony, there were presumably many instances of argon leakage, but only one report (prior to December 16, 1998) is described in the transcript. Although there is no testimony from Mr. Rogers regarding this conversation, the court notes the absence of corroborating testimony will be a frequent problem because the June 1999 hearing did not address protected activity, and several witnesses who testified at the first hearing did not testify at the September, 1999 hearing (particularly Mr. Smith, Mr. Rogers, and Mr. Heiskell).

[123] It is the court's understanding that argon is an "inert" gas, hazardous only if allowed to build up to high concentrations; it can displace oxygen in a poorly ventilated area and therefore lead to asphyxiation. (See TX, pp. 298-99, 1036; CX-4B).

was] subject to EPA regulation." Minard v. Nerco Delamar Co., 92-SWD-1, at p. 6 (Sec'y Jan. 25, 1995).

The court is persuaded Mr. Mourfield reasonably perceived that leaking argon gas was an environmental violation. Mr. Mourfield and other welders apparently have been trained that argon is "a dangerous chemical." (See, e.g., TX, pp. 44-45 (Mr. Smith)). Although Mr. Mourfield was accepted by the court as an expert in welding (based on his past experience), several questions demonstrated he has little advanced formal education in chemistry, and thus may not have been familiar with the normal atmospheric occurrence of argon. (TX, p. 281-82). Therefore, the court concludes that when Mr. Mourfield saw multiple leaks of a "dangerous chemical," he made a reasonable assumption that the release of this "dangerous" gas into the air in large quantity might violate an environmental statute, such as the Clean Air Act. Whether this was correct is irrelevant. Therefore, the court finds that Mr. Mourfield's report of leaking argon to Mr. Rogers was a protected activity.

Although a somewhat different allegation, the court will also address claims of confined space work.[124] at this point in the discussion. Mr. Mourfield and Mr. Smith both testified that at least some confined space work occurred in the "steep tanks." (TX, p. 272-73, 299-300, 303). Mr. Rogers and Mr. Heiskell admitted some confined space work occurred, although both denied it was done without safety precautions; Mr. Plaas denied knowledge that any confined space work occurred. (TX, p. 231, 256-57, 586-87, 681-82). Although it would seem that by its very nature such work could not be an environmental violation (because the danger comes from containment of the gas or fumes), the court is constrained by the Secretary's rulings in Stephenson v. National Aeronautics & Space Administration, 94-TSC-5 (Sec'y July 3, 1995) and Minard v. Nerco Delamar Co., 92-SWD-1 (Sec'y Jan. 15, 1995). In Stephenson, the Secretary concluded that the complainant's report of the offgassing of ethylene oxide and Freon into the enclosed air of a Space Shuttle cabin was a protected activity.[125] In the present case, welding using argon and other gases occurred in the enclosed space of a steep tank, allegedly without proper safety precautions. Using the same reasoning which led to

---

[124] This is work done in an area where it is difficult or impossible to properly ventilate fumes or gases, such as might be found in the enclosed space of a storage tank or vessel. The danger increases because gases are unable to dissipate and become more concentrated.

[125] On remand, the ALJ concluded the Secretary's finding was binding, but noted certain concerns, which this court agrees with: "Notwithstanding the Secretary's order ... it is questioned whether the Clean Air Act applies to this claim since it cannot be determined, based on a plain reading of the statute, if Congress intended to regulate negligible amounts of [ethylene oxide] released into an environment. Moreover, it cannot be determined whether Congress intended to regulate offgassing ... into a restricted environment such as a shuttle cabin or laboratory. It is unknown whether Congress intended to regulate the release of contaminants only into the outside environment where the pollution can drift from city to city and affect a large geographic area and a large number of people." Stephenson v. National Aeronautics & Space Administration , 94-TSC-5, note 49 (ALJ Nov. 13, 1997).

a conclusion that the report of argon leaks into the atmosphere was protected activity, the court could conclude that the release of argon and other gases and fumes into a confined space constituted a "reasonably perceived" violation of environmental law. However, even if the court were to so conclude, the court does not recall testimony or other evidence that Mr. Mourfield actually reported concerns about confined space work prior to the start of the present litigation, nor is there any mention of "confined space" work in the original OSHA investigator's file.(See generally, EX-61 (Mr. Gallop)). As discussed above, the witnessing of violations (or reasonably perceived violations) does not bring a complainant under the protection of the whistleblower statutes without some evidence of reporting or "blowing the whistle."

ii. Drunk Worker

Mr. Mourfield asserted his report of an allegedly intoxicated welder to Mr. Rogers was also protected activity. (See Complainant's Opening Brief, p. 3; Complainant's Amended PFFCL 100(a)). Mr. Mourfield claimed that using his law enforcement training and experience, he determined another worker was drunk and reported this to Mr. Rogers. (See, e.g., TX, pp. 308-09, 599, 929-930). Mr. Rogers said his own meeting with the worker did not persuade him that the worker was drunk; Mr. Heiskell said he had heard of this allegation, but relied on Mr. Rogers opinion. (TX, p. 512, 597, 599 (Mr. Rogers); p. 752-53 (Mr. Heiskell)). Mr. Mourfield alleged that later that same day he saw the worker driving a forklift carrying compressed gas cylinders, and passing near other cylinders of oxygen, acetylene, and argon, as well as a propane heater. (TX, pp. 310-11). Mr. Rogers did not deny that the worker may have driven the forklift, explaining such activity was a normal part of his job. (TX, p. 513-14, 598).

Mr. Mourfield argues reporting a drunk worker is protected activity under environmental statutes because the worker presented a risk of explosion, fire, or accident, which could lead to an environmental release. (See Complainant's Amended PFFCL 100(a); TX, p. 311). As both Mr. Rogers and Mr. Heiskell admitted Mr. Mourfield reported this incident before any alleged adverse employment activity occurred, clearly this was an internal complaint which could be protected activity.

However, Mr. Mourfield has not shown that a drunk worker *directly* violates any environmental law or regulation, and the court is persuaded under Crosby v. Hughes Aircraft Co., 85-TSC-2 (Sec'y Aug. 17, 1993), and Kesterson v. Y-12 Nuclear Weapons Plant, 95-CAA-12 (ARB Apr. 8, 1997) that the *indirect* risks of environmental violations resulting from a drunk worker were too remote and speculative to be a reasonably perceived violation of the environmental statutes. To find this a reasonably perceived violation, it must be assumed the worker was drunk, that his inebriation would cause him to make some error or mistake, that this error or mistake would either directly or indirectly (through fire or explosion) result in a chemical "release," and that the release would be of a chemical in type and amount to violate environmental laws. While the court agrees that a drunk worker on site is unsafe and may violate other laws, the court is not persuaded that any highly

speculative risk of environmental violation was reasonably perceived. Therefore, Mr. Mourfield's reporting of the allegedly drunk worker is not environmental protected activity.

iii. Bonfire and Risk of Explosion

Mr. Mourfield alleged that construction wastes of various types were burned in a bonfire, which could or did result in several possible environmental violations. (See Complainant's Amended PFFCL 100(b); see also pp. 21-22, supra). Based on the court's review, the possible violations include: the materials burned emitted hazardous fumes and gases, thus potentially violating the Clean Air Act; second, the remnants of such burning were hazardous solid wastes which were "impounded" or buried in the ground, resulting in possible violations of other environmental statutes; and third, the burning was conducted near a storage area for gas cylinders of various kinds, and aerosol cans in the fire exploded and flew through the air, often landing and throwing sparks some distance from the main fire. Mr. Mourfield also has complained of burning at two different sites: on the Bimbo Cereal site itself near office trailers and stores of gas cylinders, an area which has been smoothed over (see TX, p. 314); and at another site near ammonia tanks and other storage tanks, as shown on a video tape. (See CX-1).

As an initial matter, the court finds no indication that Mr. Mourfield complained of possible environmental violations resulting directly from the burning or burying of this waste until at least the date of the OSHA inspection, December 16, 1998. Therefore, these allegations will be discussed in a different section, below.

Mr. Mourfield testified that he and other workers frequently saw aerosol paint cans in the fire explode, fly through the air, and then continue to burn where they landed;[126] Mr. Mourfield said he and Mr. Rogers once discussed that this "was dangerous, but that's as far as that one went."[127] (TX, p. 394, 1030). Mr. Mourfield testified that he was concerned any explosion on the Bimbo site caused by these bonfires could reach tanks of diesel fuel, ammonia, and trailers full of unknown materials stored nearby, resulting in contamination of the surrounding area. (TX, p. 316-17; see also CX-1).

Mr. Mourfield's expert, Mr. Rockefeller, was asked a hypothetical question about burning construction waste materials, including aerosol cans, near tanks of argon, oxygen, acetylene, and propane. (TX, p. 957-58). Mr. Rockefeller first said this "doesn't sound like a sound safety, operational safety practice to me," but then added that this raised concerns touching upon environmental laws. (TX, p. 958-59). Mr. Rockefeller said the most important and threshold question

---

[126] However, no other witness testified regarding exploding aerosol cans, and Mr. Rogers, Mr. Heiskell, and Mr. Smith were not asked about this during their testimony at the first hearing.

[127] Although Mr. Mourfield said Mr. Rogers seemed surprised this activity was allowed, and acted as if the exploding cans were funny, there is no indication that they directly discussed the environmental risks of the exploding cans, or specifically how this was "dangerous." (See TX, pp. 1030-31).

would be whether hazardous materials were present. (TX, p. 960-61). If the materials being burned were hazardous, then burning would raise concerns of non-compliance with the Clean Air Act. (TX, p. 961, 963-64). Based on Mr. Mourfield's description of aerosol cans exploding and flying through the air, Mr. Rockefeller deduced the cans did contain hazardous materials. (TX, p. 961-62). He explained a non-hazardous material would simply explode when heated, while a hazardous material (as defined under 40 C.F.R. § 261, a "characteristic waste") would likely explode and be propelled outside of the fire. (TX, p. 961-62). Mr. Rockefeller also concluded hazardous materials were burned based on Mr. Mourfield's description of how rubber burned; Mr. Rockefeller explained rubber is difficult to burn, and since Mr. Mourfield described rubber burning, he concluded that there were other "ignitable substances" (hazardous under 40 C.F.R. § 261) in the fire. (TX, p. 963).

Even assuming that the court accepts the testimony that aerosol cans exploded and flew through the air, the resulting indirect environmental risks described by Mr. Mourfield are too remote and speculative to have been reasonably perceived under Crosby and Kesterson, *supra*. For an explosion and release to occur, an aerosol can would have to explode, be carried outside of the fire itself, land near other combustible material (it is unknown how far the cans flew), not be extinguished prior to combusting this material, and the combustion of this material would have to lead directly or indirectly to the release of a material in a quantity sufficient to constitute an environmental violation. The court assumes Mr. Mourfield's primary concern was that an aerosol can could cause an explosion in nearby stores of compressed gas (15-20 yards away), which would be large enough or throw flaming debris far enough to reach the tanks of ammonia and diesel, and then combust or release these materials. The court finds this to be an especially remote and speculative risk, since Mr. Plaas explained the tanks were on the far side of a different plant, a parking lot, and a county road, a distance of almost a quarter-mile. (TX, p. 237, 240-42; EX-58).

If Mr. Mourfield was concerned that the bonfire on the Bimbo site somehow could spread directly to the compressed gas cylinders stored nearby, again, the court finds this risk to be too remote and speculative under Crosby and Kesterson. These cylinders were stored 15 to 20 yards away from the fire, and were a mix of empty and full cylinders, meaning not all of the cylinders were explosive or hazardous. (TX, p. 314-15, 391-92). The court also notes no mention of whether the fire was attended or unattended; presumably an attended fire is less dangerous than an unattended one. In addition, there is no evidence or testimony that any concerns Mr. Mourfield may have had about the fire spreading directly to the cylinders were expressed to anyone else, at least not prior to the OSHA visit of December 16, 1999. While the court agrees that a bonfire with explosive aerosol cans close to a storage area for gas cylinders was probably was not a safe practice, the court concludes reporting this practice is not environmental protected activity.

As for the smoldering burn pit shown on CX-1, the evidence fails to show any of this burning occurred during the period of Mr. Mourfield's employment; the videotape itself was not recorded until several months after Complainant left the employ of Plaas, Inc.[128] There also is no testimony

[128] The date stamp on the videotape indicates it was recorded May 5, 1999, more than four months after Mr. Mourfield last worked for Plaas, Inc. (December 23, 1998), and more than three

that any complaint about this site was raised by Mr. Mourfield prior to the start of litigation. Even if the court assumed some burning occurred on this site while he was still employed by Plaas, Inc., the court finds Mr. Mourfield had no reasonable basis to conclude that the burning occurred on property under the control of Respondents' or anyone else connected with the work on the Bimbo Cereal site. (See TX, p. 388-89 (Mr. Mourfield admits no knowledge of who is doing the burning, if it is occurring on Bimbo Cereal property, or of any Plaas, Inc. employees who worked in that area)). Mr. Plaas explained this location was some distance away from the Bimbo Cereal site (TX, p. 237, 240-42), and Mr. Smith agreed that he did not know of any tanks kept there by Plaas, Inc. (TX, pp. 50-51). The court's own review of the CX-1 confirms that some burning did occur near various storage tanks, but this was some distance away from the work area of Plaas, Inc. (See CX-1 (showing road, parking lot, and another facility between Bimbo Cereal job site and storage tanks)). Despite these facts, Mr. Mourfield continued to assert at the hearing that Plaas, Inc. had some responsibility, because "safety is everyone's responsibility." (TX, p. 390). Finally, even if the court was persuaded Mr. Mourfield reasonably perceived Plaas, Inc. was responsible for this burning and that it occurred during his employment, the court would again conclude that the risk of an environmental violation as an indirect[129] result of the burning was remote and speculative to have been reasonably perceived.

iv. Lack of MSDS and HAZCOM Training

Mr. Mourfield's early filings were primarily concerned with a lack of access to MSDS and a lack of HAZCOM training on the Bimbo Cereal site. (See, e.g., Complainant's April 16, 1999 Amended Complaint, numbers 4, 5, 14, 19, 20, 21, 26). Mr. Mourfield alleged that MSDS were not on-site, or if they were, that he and other workers were denied access to the area where they were kept.[130] (TX, p. 290-91, 1076; CX-12A, B). Mr. Mourfield also alleged that despite requests, workers were given inadequate HAZCOM training. (TX, p. 322, 420; CX-12A, B). Finally, Mr. Mourfield said he and the other workers were asked to sign a false statement, a certification stating they had received HAZCOM training. (TX, p. 290, 322, 674-75; CX-12A, B).

Mr. Mourfield supports his claim of environmental whistleblower status with the statement that MSDS's "mention environmental laws, including CERCLA ...." (Complainant's August 27, 1999 Opening Brief, p. 1). The court's own review of the example MSDS demonstrates that this is true for at least some of the MSDS provided, which mention CERCLA and the TSCA in particular. (See CX-4A, 4B). The court also notes that Plaas, Inc. was cited by OSHA for failing to develop a

---

months after his whistleblower complaint was filed (January 1999). (See CX-1).

[129] Unlike the burning that occurred on the Bimbo Cereal site itself, the court finds no evidence or testimony describing what was being burned, and thus there is no basis for the court to even begin to evaluate whether the burning itself would constitute a reasonably perceived violation of environmental law.

[130] Mr. Smith also testified workers were unable to review MSDS. (TX, p. 39, 64).

method "to assure employees on the job site had access to MSDS." (CX-3A, p. 5). Finally, Mr. Mourfield complained about access to MSDS several times, as evidenced by his tape recorded conversation with Mr. Heiskell. (CX-12A, B; see also TX, p. 290).

However, the court is unpersuaded that complaints about the absence of or lack of access to MSDS constitute environmental protected activity. Mr. Mourfield has failed to demonstrate that any of the environmental statutes require employee access to MSDS on a construction site, and the court's own research fails to demonstrate that such access is required under the environmental acts (although access does appear to be required under certain OSHA regulations).[131] The court also is not persuaded that the mere mention of environmental acts on a MSDS or the failure to provide access to them led Mr. Mourfield to a reasonable perception that Respondents were somehow violating environmental laws; the risk that experienced welders would mishandle the common materials and tools of their trade in such a way as to lead to possible environmental violations as a result of the absence of these sheets is simply too remote and speculative. Mr. Mourfield also apparently believes that because MSDS mention environmental laws, they therefore "touch on" environmental law. However, the court's review persuades it that a generally occupational complaint only "touches on" environmental law if the violation could affect the general public or environment, not simply by the mere mention of a certain statute on a document. (See, e.g., Scerbo v. Consolidated Edison Co. of New York, Inc., 89-CAA-2 (Sec'y Nov. 13, 1992)(finding the complainant's reports primarily concerned occupational safety and health, but "touched on" environmental law, thus providing complainant with environmental whistleblower status).

Plaas, Inc. also was cited by OSHA for deficiencies in HAZCOM training, specifically for the failure of the written program to "describe how employees would be trained in accordance with [29 C.F.R. §] 1926.59 paragraph (f)(g)/(h)." (CX-3A, p. 5). Although there is ample evidence that Mr. Mourfield made internal complaints to Respondents' managers about HAZCOM training (see TX 289-90, 322, 1075-76; CX-12A, B), the court is unpersuaded that this constitutes environmental protected activity.

First, the HAZCOM training requirements described in the OSHA report are found in OSHA regulations, not environmental laws or regulations. Secondly, although the OSHA report states that employees were "exposed" to a various hazardous chemicals,[132] the context of the report makes it clear that the investigator was concerned that these chemicals were being used without proper HAZCOM training or access to MSDS, and not that the actual use was unusually hazardous to workers or the environment. (See EX-61 (unnumbered)). The OSHA report also does not discuss any actual or possible environmental law violations or possible releases of the chemicals. (See generally, EX-61). The possibility that a lack of HAZCOM training could lead to an environmental

---

[131] Even the name, "Material Safety Data Sheets" (emphasis added), suggests they are more concerned with worker safety than possible environmental hazards.

[132] These chemicals included (but were not limited to): argon, oxygen, acetylene, diesel, gasoline, PVC solvent cement, Rapid-Tap cutting fluid, and PVC purple primer. (See EX-61 (unnumbered)).

violation requires assumptions that the lack of training would cause an employee to somehow mishandle a substance,[133] that substance would be hazardous, that substance would not be contained and would be released into the environment, and in an amount sufficient to constitute an environmental violation. In addition, Mr. Mourfield's own Amended PFFCL described the risks presented by lack of HAZCOM training and access to MSDS as risk "of injury or illness to employees ... [from] fire, explosion, and chemical burns." (Complainant's Amended PFFCL 1A, p. 2 (emphasis added). Unlike in Scerbo, *supra*, there is no indication that this occupational concern could have or did affect the general public or environment, and therefore it does not "touch on" environmental law and provide environmental whistleblower protection for Mr. Mourfield. Therefore, the court is persuaded that Mr. Mourfield could not have reasonably perceived that the lack of HAZCOM training was an environmental law violation.

For many of the reasons discussed above, the court also is unpersuaded that Mr. Mourfield's refusal to sign an allegedly false certification is protected activity under environmental whistleblower law. (See CX-12A, 12B). The court does not wish to suggest that Mr. Mourfield should have been required to sign a document he felt was false. However, the HAZCOM training that his signature would acknowledge he received was not required under environmental law, but

under OSHA regulations. (See 29 C.F.R. §1926.59 paragraph (f)(g)/(h)). Refusal to sign a document may be environmental protected activity in other circumstances, but the court is not persuaded it rises to the level of environmental protected activity in this case.

Therefore, the court concludes that Mr. Mourfield's complaints about the lack of access to MSDS, a lack of HAZCOM training, and the request he sign an allegedly false certification do not constitute environmental protected activity. Again, such reports may be protected activity under other statutes, but this court has jurisdiction over those statutes.

v. Union Activities

Although Mr. Mourfield denied he was attempting to "unionize" Plaas, Inc. (TX, p. 438-39), the evidence and testimony make it clear this was at least a subsidiary goal. (See TX, pp. 439-440 (handed out stickers, buttons, etc.), pp. 440-41 (union election petition filed); CX-7 (signed "Authorization for Representation" cards); EX-23 to EX-26 (various complaints to NLRB); TX, p. 518 (statement to Mr. Rogers job would be better if unionized)). Even if such "pro-union" activities were protected activity under other federal law, such activity does not fall under environmental whistleblower protection. However, Mr. Mourfield said his union activities were intended to inform workers of their "rights" to a safe working environment, to appropriate training, and to know of hazardous materials. (TX, pp. 439-40, 1028-29). While this may seem to fall under a broad

[133] The court believes this especially unlikely, based on testimony that there were no hazardous materials on site except those commonly used by Plaas, Inc. welders. (See, e.g., TX, p. 661, 740-410).

"environmental" ambit, the court does not feel this is protect activity under environmental whistleblower statutes.

If Mr. Mourfield's union activity included references to reasonably perceived or actual violations of environmental law by Plaas, Inc., then such actions may have constituted environmental protected activity. For example, in Immanuel v. Wyoming Concrete Industries, Inc., 95-WPC-3 (ARB May 28, 1997)(vacated on other grounds, remanded and settled), the ARB agreed with the ALJ's finding that the complainant's distribution of a leaflet that raised environmental concerns grounded in conditions reasonably perceived as violations of the FWPCA was protected activity. Similarly, in Garn v. Toledo Edison Co., 88-ERA-21 (Sec'y May 18, 1995), the Secretary assumed for the purposes of the decision that picketing or "protest" activity, designed to inform the respondent and the public of the complainant's belief that the respondent was committing safety violations, is protected activity. However, there is no evidence that Mr. Mourfield coupled his "advising" with allegations of Plaas, Inc. violations of environmental law; therefore; this was not protected activity under the environmental statutes.

vi. Hostile Work Environment

Mr. Mourfield also alleged he was subject to a hostile work environment, both from other workers and from management, particularly Mr. Rogers. (See, e.g., CX-6A, 6B; TX, p. 327, 442-43, 444-46, 1053-54). While a hostile work environment can be an example of adverse employment activity, reporting such an environment also can be a "protected activity." For example, a discussion with a manager in which complainant reported that he had been retaliated against for being "open" with management was found to be protected activity. Dodd v. Polysar Latex, 88-SWD-4 (Sec'y Sept. 22, 1994). In Diaz-Robainas v. Florida Power & Light Co., 92-ERA-10 (Sec'y Jan. 10, 1996), the Secretary held that a complaint to management alleging retaliation for safety concerns was also a protected activity. In both cases, the workers previously had engaged in some type of activity protected under the statute in question, and were subjected to the hostile environment as a result.

However, in the present case, Mr. Mourfield's counsel indicated there was no claim that this was an element of protected activity. At the second hearing in September 1999, Respondents' counsel was inquiring into whether Mr. Mourfield testified previously that he had reported a hostile work environment to the OSHA investigator, and Mr. Mourfield's counsel interjected to explain his previous questions had focused on "strictly environmental protected activity ...." (TX, p. 1056). Respondents' counsel then said "The only reason I'm asking ... is because in [the] amended complaint and in his post-trial brief, he refers to the hostile environment as being an element of the protected activity." (TX, p. 1056). Mr. Mourfield's counsel immediately responded by saying "No. As an element of the discrimination, Your Honor." (TX, p. 1056). Thus, the court concludes Mr. Mourfield has not alleged that his reports of hostile working environment are protected activity, and will not address the issue further.[134]

---

[134] However, the court will consider the reported hostile work environment as a possible "adverse employment activity," below.

vii. Tape Recordings

Although not specifically raised, the court will also briefly consider the possibility that Mr. Mourfield's taping of conversations around the job site could have been a protected activity.[135] Mr. Mourfield admittedly taped a number of conversations during November and December 1998, some of which have been entered into the record. The court's research has located at least two cases in which surveillance was found to be protected activity. (See Adams v. Coastal Production Operators, Inc., 89-ERA-3 (ALJ, Feb. 14, 1989), *affirmed* (Sec'y Aug. 5, 1992)(taking photographs of violation); Mosbaugh v. Georgia Power Co., 91-ERA-1, 11 (Sec'y Nov. 20, 1995)(tape recordings in support of NRC investigation). However, the court feels the present case is distinguishable from both Adams and Mosbaugh because in those cases, the complainant began documenting the violations leading to his protected reports; in Mosbaugh, the surveillance activity was undertaken as part of a formal government investigation. In the present case, Mr. Mourfield said he began taking notes after he felt an injured employee was unfairly treated (See TX, pp. 398-99, 401), and began using a recorder to be "covered," in case it ever became "word against word." (TX, p. 437-38). Unlike in Adams and Mosbaugh, Mr. Mourfield's efforts to collect information did not begin as part of an attempt to support previous complaints or protected activity; rather, Mr. Mourfield's recordings could be more aptly compared to a "fishing expedition."

viii. Miscellaneous Concerns

Mr. Mourfield also alleged a number of miscellaneous hazards on the job site, including: the failure to use "blinds" to shield other workers from the harmful "rays" produced by welding (TX, p. 296); welders filling fuel tanks of welding machines and generators, resulting in fuel spillage on shoes and clothing which could catch fire (TX, pp. 296-97); inadequate ventilation for welding stainless steel, with no devices to measure air flow (TX, p. 297); inadequate ventilation for argon use; (TX, pp. 298-99); damaged or poorly repaired extension cords (TX, p. 305); damaged and missing body harnesses (TX, p. 305-07); and alcohol soaked rags piled on the floor near welders and falling sparks. (TX, pp. 307-08).

However, the court is unpersuaded that most of these concerns are environmental protected activity. Allegations regarding the use of gasoline, worn extension cords, damaged body harnesses, and alcohol soaked rags on the floor either completely fail to implicate environmental law (such as damaged safety harnesses and damaged extension cords), or do so only very remotely and speculatively (possibility that a welding spark could ignite rags, causing fire and possibly an explosion which might reach tanks and cylinders and result in an environmental release). In addition, the way these allegations were presented persuades the court that Mr. Mourfield was primarily concerned with worker safety, not the environment; for instance, he did not claim that spilled gasoline was a pollutant in violation of environmental laws, instead arguing that gasoline spilled on clothing could catch fire and injure a worker. (See Complainant's Amended PFFCL number 100(f); TX, pp. 296-97). Finally,

[135] The court will not address whether such recordings are legal in the state of Texas.

there is no evidence that these complaints were reported prior to the start of the instant litigation.[136]

Mr. Mourfield's complaint about the use of "blinds" to protect against the "harmful rays" produced by welding seems to implicate or "touch on" environmental concerns, but Mr. Mourfield has failed to explain how this might be a reasonably perceived violation of environmental law, and there is no evidence of when, if ever, this was reported prior to the start of the present litigation. The allegations regarding inadequate ventilation for stainless steel welding also are primarily occupational in nature, but could "touch on" environmental concerns; however, no evidence has been presented that this was reported prior to the start of litigation.[137] Finally, Mr. Mourfield's allegations regarding improper ventilation for argon use have been dealt with above, and will not be repeated here.

Therefore, the court finds no other instances of protected activity in these miscellaneous hazards described by Mr. Mourfield.

b. Events of December 16, 1998

i. Contacting OSHA

Sometime prior to December 14, 1998, Mr. Mourfield contacted OSHA with the assistance of local union leader Mr. Don Green (TX, p. 382) to report the various safety problems he perceived at the job site. (See generally, EX-61 (OSHA investigator's file)). Although the actual contact letter apparently is not in evidence, from the report prepared by the investigator, it appears Mr. Mourfield raised four concerns: employees had not received HAZCOM training; employees had not received information on the location of MSDS; employer had not made MSDS available in the workplace; and there was no electrical grounding protection. (See EX-61 (unnumbered)).

Mr. Mourfield alleged that CERCLA's protections are broader than those provided in the other environmental statutes, because that statute (in part) prohibits discrimination against any employee who "has provided information to a State or to the Federal Government ...." (42 U.S.C. § 9610(a)). Mr. Mourfield argued that since he provided information to OSHA, he is protected under CERCLA. (See Complainant's August 27, 1999 Opening Brief, p. 1). The court has located at least one decision in which the Secretary seems to agree: in Post v. Hensel Phelps Constr. Co., 94-CAA-13 (Sec'y, Aug. 9, 1995), the Secretary concluded that contact with OSHA was a protected activity under CERCLA, even if it concerned solely occupational safety and health concerns. However, later ARB decisions concluded that contact with OSHA officials does not automatically confer CERCLA

---

[136] The court notes that the OSHA report (EX-61) does mention improper use of extension cords, and Mr. Mourfield testified he had spoken with Mr. Rogers about safety harnesses. (TX, pp. 306-07). However, these are two of the clearest instances of possible OSHA protected activity, not environmental protected activity.

[137] Mr. Rockefeller did not know whether welding indoors or in confined space without proper measurement and ventilation would be a violation of the Clean Air Act. (TX, p. 973).

whistleblower status if the complaints do not otherwise implicate environmental statutes. See, e.g., Roberts v. Rivas Environmental Consultants, Inc., 96-CER-1 (ARB Sept. 17, 1997); Tucker v. Morrison & Knudson, 94-CER-1 (ARB Feb. 28, 1997). As the four complaints made to OSHA prior to the site visit have already been addressed by the court and found for various reasons not to constitute environmental protected activity, the court must conclude that making these same complaints to OSHA does not provide environmental whistleblower.

ii. Looking for OSHA on December 16, 1998

On the day of the OSHA site visit, Mr. Mourfield and Mr. Smith abandoned their work area and began searching the job site for the OSHA investigator. Before they found him, they were intercepted by Mr. Rogers, leading to an argument and their alleged firing. Mr. Mourfield and Mr. Smith repeatedly insisted they speak to the OSHA investigator immediately, but Mr. Rogers refused, telling them to return to work and wait for the investigator to come to them. (See TX, pp. 34-35, 39, 410, 431).

While the court agrees that employees have a right to speak with a federal investigator, the court also agrees they do not have a right to do so at a time and place completely of their own choosing. See, e.g. Lockert v. U.S. Dept. of Labor, 867 F.2d 513, 518 (9th Cir. 1989)(employee had not engaged in protected activity by being away from his work area without permission where employer provided valid reasons for rule). In this case, the court feels Mr. Rogers was acting within his authority as foreman to order the men to return to work, and to tell them the investigator would speak to each employee as he inspected the job site. The court also notes that both Mr. Rogers and Mr. Smith testified Mr. Rogers did not say the men could not speak to the OSHA investigator, but said OSHA would be by soon to see them. (See TX, p. 53, 515-16). Respondents also provided valid reasons against allowing employees to wander the job site, including lowered productivity, concern for safety, and the need to locate employees quickly if necessary. (See e.g., TX, pp. 181-82).

Mr. Mourfield has also pointed out that Respondents admitted to having a "chain of command," and that they expected employees to report concerns to their supervisors first, instead of to outside persons or agencies. (See *supra*, Section III. D.) Mr. Mourfield suggests Respondents were angry at him for breaking this "chain of command," ultimately leading to his discharge. (See, e.g., Complainant's Amended PFFCL, pp. 38-40). While the caselaw is clear that employees have the right to contact outside agencies to express concerns and they may not be retaliated against for doing so, in this case the court has already concluded that the reports Mr. Mourfield made during his initial contacts with OSHA were not environmental protected activity, and thus are not protected under environmental whistleblower law.

Finally, as the court has concluded that the mere fact that Mr. Mourfield contacted OSHA does not make him an environmental whistleblower, neither should his insistence on seeing the

investigator immediately. In addition, there was no testimony that Mr. Smith or Mr. Mourfield told Mr. Rogers (at this point) that they wanted to speak to the OSHA investigator about any environmental issues; instead the record reveals that the only complaint raised during their initial argument was the lack of HAZCOM training. (See TX, p. 330, 516). As the court found Mr. Mourfield's previous complaints about a lack of HAZCOM training were not environmental protected activity, they also were not in this instance. For the reasons discussed above, the court does not feel that Mr. Mourfield's insistence on seeing the OSHA investigator meant he engaged in environmental protected activity at that time.

iii. Reports to the OSHA Investigator

a. Meeting #1: In the "Cook Room"

At their first meeting, Mr. Mourfield told the OSHA investigator he had not received proper HAZCOM training or access to MSDS. (TX, p. 334-35; TX, p. 36 (confirmed by Mr. Smith)). However, as discussed above, the court is persuaded that reports about HAZCOM training and MSDS do not constitute reasonably perceived violations of environmental law, and reporting them to an OSHA investigator does not change this conclusion. (See Roberts v. Rivas Environmental Consultants, Inc., 96-CER-1 (ARB Sept. 17, 1997)(reports to OSHA do not automatically qualify for CERCLA protections); Tucker v. Morrison & Knudson, 94-CER-1 (ARB Feb. 28, 1997).

Mr. Mourfield also reported that he had been fired for trying to find the investigator. Clearly this is a report of an adverse employment activity. However, several cases have found that reports of adverse employment activity can be a protected activity as well. For example, in Diaz-Robainas v. Florida Power & Light Co., 92-ERA-10 (Sec'y Jan. 19, 1996), the Secretary concluded that a report of discrimination could be a protected activity, because the complainant was actually reporting a violation of the portion of the statute preventing such discrimination. The complainant had complained in a letter to company officials that his poor evaluation was in retaliation for his protected activity; the Secretary concluded that complainant reasonably perceived that employer violated the statute by so discriminating against him. (See Diaz-Robainas, at pp. 5-6).

However, in the present case, the court concludes Mr. Mourfield did not reasonably perceive that Respondents' actions violated environmental whistleblower provisions that day, although he may have perceived a violation of OSHA's whistleblower provisions. First, Mr. Mourfield had chosen to contact OSHA, not the EPA or any other government agency, with occupational safety concerns, such as a lack of HAZCOM training and improperly grounded extension cords (see TX, p. 318, 382); second, when he was allegedly fired that day, Mr. Mourfield was insisting he be allowed to see an OSHA investigator, and he had mentioned HAZCOM training, which the court has previously found to be an occupational health and safety concern (see e.g., TX, p. 330, 431-433); and finally, when Mr. Mourfield's initial claim of discrimination was filed several days later, it was filed under the whistleblower provisions of OSHA, not any of the environmental statutes. (See e.g., EX-38 (letter

from OSHA to Respondents informing them of complaint)). Thus, the court concludes Mr. Mourfield perceived his alleged firing violated OSHA provisions, not the environmental statutes, and therefore his reports of the firing may have been protected under OSHA, but were not protected under any environmental statutes.

At the September 1999 hearing, Mr. Mourfield testified that he also reported leaking argon gas to the OSHA investigator. (TX, p. 1033-34). As discussed above, while argon gas leaks may not be an actual environmental violation, the court is persuaded that Mr. Mourfield reasonably perceived that they might be so, and therefore reporting this leakage was a protected activity. However, the court is concerned by Mr. Mourfield's failure to describe this report at the first hearing.[138] In addition, the court does not recall any testimony on this subject from other witnesses, and finds no record of this in the OSHA investigator's file.[139] (See generally, EX-61). However, as the court has already found Mr. Mourfield engaged in protected activity by reporting leaking argon to Mr. Rogers, and feels his testimony was generally credible, the court will accept Mr. Mourfield's account.

Mr. Mourfield's filings alleged he also discussed with the OSHA investigator (in front of various contractor supervisors) his concerns about the burning of trash and possible chemical releases. (See Complainant's Amended PFFCL 1A, p. 1; TX, pp. 1031-33). However, after reviewing the transcript, the court is persuaded that its original understanding of Mr. Mourfield's testimony was correct: he discussed these concerns in a later private meeting with OSHA (termed "Meeting # 3" by the court). (See TX, pp. 1031-33). Mr. Mourfield testified "When we discussed the open burning pit and the chemicals in it was the problem .... this was when we had our closed-door meeting." (TX, p. 1031). Later, Mr. Mourfield testified "that's when he told me that he would talk to me later in private, and this is when the conversation come up about the open pit and the chemicals being burned." (TX, p. 1032). Therefore, these claims will be discussed in that section, below.

b. Meeting #2: With the Supervisors

Mr. Mourfield testified he and Mr. Smith were invited to sit in on a meeting between the OSHA investigator and the supervisors from the various companies working on the Bimbo Cereal site. (TX, p. 335). However, there is little testimony as to what was discussed in this meeting, other than indications that the investigator inquired into employee rights posters and HAZCOM training. (See e.g., TX, p. 46). Assuming that Mr. Mourfield spoke in this meeting, it is unknown what he may have said; therefore the court finds no evidence of any environmental "protected activity."

c. Meeting #3: Private Meeting

---

[138] Mr. Mourfield blamed this omission on poor questioning by attorneys. (TX, p. 1048). The court notes that protected activity was not at issue in the first hearing, although several possible instances were discussed anyway.

[139] Mr. Mourfield blames the absence of this information from the OSHA report on the dishonesty of the investigator. (TX, pp. 1050-51).

While it is true that concerns raised in a private meeting with the OSHA investigator may not satisfy the "knowledge" requirement (discussed below), any reports made in this meeting still may constitute environmental protected activity. According to his testimony at the June 1999 hearing, Mr. Mourfield again discussed his concerns over the lack of HAZCOM training and his alleged firing that day. (TX, p. 336). At the second hearing, Mr. Mourfield testified he also discussed leaking argon, the bonfire (including the actual release of chemicals into the air and potential contamination of ground water), and the possibility of various accidents. (TX, pp. 1031-34, 1049-50).

Many of the concerns Mr. Mourfield allegedly raised during this meeting have been previously addressed, so the court will not go into detail again. The court found that concerns over lack of HAZCOM training and MSDS access are not protected activity under the environmental statutes. Likewise, the court concluded that Mr. Mourfield's discussion of his alleged firing may be protected under OSHA 11(c), but is not protected activity under the environmental statutes. The court has also already decided that reports of leaking argon are an environmental protected activity, but reports of burning which implicate concerns of secondary explosions are not.

However, Mr. Mourfield also allegedly raised concerns about chemicals that may have been released by the burning of the trash in the fire. (TX, pp. 1031-33, 1049). As previously discussed, the proper inquiry is "whether under the circumstances it was reasonable, given [Mr. Mourfield's] training and experience, fo him to believe that [burning construction wastes was] subject to EPA regulation." Minard v. Nerco Delmar Co., 92-SWD-1, at p. 6 (Sec'y Jan. 25, 1995). The court finds that Mr. Mourfield reasonably perceived that the burning of what he perceived as hazardous materials (such as pipe cleaner, pipe dope, and rubber), was a violation of environmental law. Thus reporting this burning to the OSHA investigator constituted an environmental protected activity.

Mr. Mourfield's expert, Mr. Rockefeller, also testified regarding potential environmental violations resulting from the burial of any materials not consumed by the fire. (TX, p. 954, 960, 969-70). Mr. Rockefeller said the most important question was whether hazardous materials were present, because if not, surface impoundment (or burial) makes no difference. (TX, p. 960-61). However, the court does not recall that Mr. Mourfield testified at either hearing regarding burial of wastes, except for a brief comment that he could not videotape the original burn site because this area had been "smoothed over by heavy machinery." (TX, p. 314). Thus, the court concludes there was no evidence introduced to support this claim, other than his testimony the site had been smoothed over. Of course, Mr. Mourfield also never testified that he reported his concern over the burial of the waste to anyone prior to the start of the hearing.[140] Since there is no evidence Mr. Mourfield reported this possible violation to anyone other than his own expert witness well after his employment had ended, the court concludes he did not engage in protected activity.

iv. Reports in the Conference Call

[140] The closest he comes is a claim that he discussed potential pollution of the local aquifer. (TX, p. 1049).

During the conference call, Mr. Mourfield reported only his alleged firing, and his concerns about a hostile work environment. (See CX-6A, B). As discussed above, the court finds Mr. Mourfield has not alleged that the hostile work environment reports were an element of protected activity. (See TX, p. 1056). Likewise the court is not persuaded that the reporting of his alleged firing is protected environmental whistleblower activity. The court has previously concluded that at that time Mr. Mourfield reasonably perceived only that Respondents' had violated OSHA 11(c), not any of the environmental statutes. Therefore, the court concludes no environmental protected activity occurred during this phone call.

c. Filing of Complaints and Settlement Negotiations

i. Filing of OSHA 11(c)

Clearly, Mr. Mourfield's filing of an OSHA Section 11(c) complaint of unlawful employment discrimination is not a protected activity under environmental whistleblower laws, although it probably would be under OSHA. Similarly, Mr. Mourfield's multiple claims to the NLRB (see RX-23 to RX-26), also are not environmental protected activity, but may be protected activity under other federal statutes.

ii. Mention of Environmental Rights in Settlement Offer

Mr. Mourfield also alleged that during "putative settlement negotiations, Respondents ended talks because Mr. Mourfield asserted his DOL environmental whistleblower rights." (Complainant's Amended PFFCL, number 28). Based on the letters and faxes in the record, Mr. Mourfield's environmental whistleblower rights were first mentioned in a January 14, 1999 letter from Mr. Mourfield's counsel to Ms. Nardizzi, in which he offered settlement terms including "release of his rights to file an environmental whistleblower claim under Clean Air Act (CAA), Toxic Substance Control Act (TSCA) or any other environmental whistleblower laws ...."[141] (EX-14). Mr. Mourfield alleges that soon after this settlement offer, Respondents broke off talks, because he "asserted his whistleblower law rights and 'got coun[se]l.'" (Complainant's Opening Brief, number 11).

However, the evidence reveals that Mr. Plaas did respond to this offer on January 15, 1999 (although he refused it), and made a counter-offer, including reinstatement and "some back wages." (CX-5C; EX-11). Complainant's counsel responded that same day, and again on January 16, 1999, basically reiterating the previous settlement offers, including the waiver of rights to file an environmental whistleblower claim. (See EX-15; EX-16).

Respondents sent a final letter to Mr. Mourfield January 18, 1999, in which they described

---

[141] Other terms included: reinstatement with non-discriminatory terms and conditions in a non-hostile environment; back pay (approximately $4,000.00); purging of derogatory information related to the lay off / termination from employment records; up-to-date posting of employee rights information; and attorney's fees of over $1,500.00. (CX-14, EX-14; see also EX-15).

Mr. Mourfield's stated desire to return to work as "nothing more than a stall tactic,"[142] and said that instead of accepting reasonable terms to return, he had chosen to "seek council." [sic] (EX-12). Respondents indicated they had previously agreed to back pay (with no reinstatement) through January 22, 1999, or to reinstatement and back pay through January 15, 1999. (See EX-12). Respondents closed by saying further negotiations appeared pointless, and they would go ahead with a full OSHA investigation. (See EX-12).

After consideration, the court is not persuaded that the mention of and offer to waive rights under these environmental statutes is a protected activity.[143] Mr. Mourfield claims his letter and settlement offers included an assertion of his whistleblower rights; however, a review of the language of the letters persuades the court that Mr. Mourfield had not done so. In fact, Mr. Mourfield was offering to not commence an action under the statute as part of the settlement, and did not even threaten to begin such an action. The only rights Mr. Mourfield had asserted at this point in the negotiations were his rights under OSHA. Therefore, the court concludes the offer to waive his environmental whistleblower rights was not environmental protected activity.[144]

B. Knowledge of Protected Activity

The second element of a prima facie case requires Mr. Mourfield to show Respondents had knowledge of his protected activity. As discussed above, the court finds that Mr. Mourfield's only protected activities under the environmental statutes were: his reports of leaking argon (both to Mr. Rogers, and to the OSHA investigator on December 16), and reports of chemical releases from the burning of trash in the bonfires.

The court finds that Respondents had knowledge of his reports of leaking argon on several occasions. The first report was made as part of a discussion with Mr. Rogers sometime in November 1998, a second report was made during Mr. Mourfield's first meeting with the OSHA investigator on December 16, 1998, and a third report was made during a private meeting with the OSHA investigator. Therefore, the court concludes Respondents had knowledge of this protected activity in November 1998 (Mr. Mourfield's discussion with Mr. Rogers), and again on December 16, 1998, when Mr. Mourfield reported leaking argon to the OSHA investigator during their first meeting in front of the supervisors. However, the only persons present during the third and private meeting

---

[142] The parties had been exploring settlements using Ms. Nardizzi as a mediator of sorts since the end of December, 1998.

[143] Arguably the break-off of negotiations could be seen as adverse employment activity, and this question will be addressed separately below.

[144] Some decisions have found settlement agreements which contain "gag provisions" preventing the employee from testifying or assisting in any investigation to be illegal; however, the court points out that in this case, there was no such provision preventing testimony, and the offer to waive Mr. Mourfield's rights to file a claim was made by him and his counsel, not Respondents.

were the OSHA investigator, Mr. Smith, and Mr. Mourfield. There is no indication that any representative of Respondents was informed of what may have been discussed in this meeting, and the citations eventually made against Plaas, Inc. by OSHA do not mention argon leaks. (See CX-3A; EX-30). Therefore, the court concludes that Respondents did not know of the protected activity (report of argon leaks) in the third meeting.

Mr. Mourfield's filings allege he also discussed reports of chemicals released by the burning of construction wastes with OSHA (in front of various contractor's supervisors). (See Complainant's Amended PFFCL 1A, p. 1; TX, pp. 1031-33). However, after reviewing the transcript, the court is persuaded that its original understanding of Mr. Mourfield's testimony was correct: he discussed these concerns in the later private meeting with the OSHA investigator. (See TX, pp. 1031-33). Mr. Mourfield testified "When we discussed the open burning pit and the chemicals in it was the problem .... this was when we had our closed-door meeting." (TX, p. 1031). Later, Mr. Mourfield testified "that's when he told me that he would talk to me later in private, and this is when the conversation come up about the open pit and the chemicals being burned." (TX, p. 1032). As Respondents were not present during the private meeting, there is no way they could have been aware of what was said, at least until receipt of the OSHA report, which does not discuss these concerns.[145] (See CX-3A; EX-30). Therefore, the court concludes that Respondents did not have knowledge of this protected activity.

C. Adverse Employment Action

Again, the court's own review reveals at least five possible adverse employment actions.

1. Hostile Work Environment

It is well-settled that adverse employment action can include the creation of a hostile work environment. See, e.g. Carter v. Electrical District No. 2 of Pinal County, 92-TSC-11 (Sec'y July 26, 1995) (employees instructed not to talk to Complainant; attitude toward Complainant changed to "loss of trust" and calling Complainant inept and an "s.o.b."). The elements of proof in a hostile work environment case are: the employee engaged in protected activity and suffered intentional retaliation as a result; the retaliation was pervasive and regular; the retaliation detrimentally affected the employee; the retaliation would have detrimentally affected other reasonable whistleblowers in that position; and the existence of respondeat superior liability. See Smith v. Esicorp, Inc., 93-ERA-16 (Sec'y Mar. 13, 1996); Varnadore v. Oak Ridge National Laboratory, 92-CAA-2, 5 and 93-CAA-1 (Sec'y Jan. 26, 1996).

In Dobreuenaski v. Associated Universities, Inc., 96-ERA-44 (ARB June 18, 1998), the ARB adopted the ALJ's finding that employer could not be fairly held responsible for any isolation, ostracism, or scorn to which the complainant was subjected by his co-employees, because the record

---

[145] The court also finds it curious that neither Mr. Gallop's report nor Mr. Smith's testimony mention any discussion of chemicals released by the bonfire.

in that case failed to establish that respondent independently or otherwise orchestrated and/or originated any such adverse peer response. See id. at 13. Similarly, an allegation that a co-worker threatened complainant based on the belief that complainant had turned him in for not following safety procedures cannot be considered part of a hostile work environment claim where the complainant does not allege that he told his employer about the threat at the time and therefore cannot now allege that the employer acted inappropriately in responding to the threat. See Boudrie v. Commonwealth Edison Co., 95-ERA-15 (ARB Apr. 24, 1997).

In the present case, the court concludes that the any hostile environment primarily came from Mr. Mourfield's fellow workers, not management, and in response to his pro-union activities.[146] In addition, the court notes Mr. Mourfield testified he deliberately failed to report these alleged incidents of violence and harassment to management, and when he finally did make a report during the conference call, he was vague and refused to provide the specific evidence he claimed to have. Mr. Plaas, Mr. Heiskell, and Mr. Rogers continuously denied they were aware of any hostile environment until the conference call of December 16. Since Mr. Mourfield has provided little evidence that Respondents encouraged this treatment by his fellow employees[147] and he deliberately failed to report these incidents, under Dobreuenaski and Boudrie, *supra*, Respondents can not be held responsible for this environment.

Respondents and the Plaas, Inc. supervisors did know of the destruction of Mr. Mourfield's lunch, and of course of any hostility that they may have shown Mr. Mourfield. It is unclear from the testimony who was responsible for the destruction of his lunch; however, there was testimony that the supervisors were "shocked," and immediately held a meeting to threaten termination for any repeat incident. Mr. Mourfield's own testimony revealed only a handful of "incidents" between himself and Mr. Rogers (over the leaking argon, his arrival in pro-union clothing, his request for body harnesses, and the events of December 16). However, Mr. Mourfield himself testified that generally he and Mr. Rogers got along. Mr. Mourfield also alleged Respondents' hostility towards him was demonstrated by his "interrogation" during the conference call (see Complainant's Amended PFFCL 6(a)), and the hostile "tone" taken by Mr. Plaas during this call (see Complainant's Amended PFFCL 51).

After review, the court is not persuaded that Mr. Mourfield has met the requirements under Smith and Varnadore, *supra*. First, the court has reviewed both the transcript and audiotape of the conference call of December 16, 1998, and does not agree that Mr. Mourfield was "interrogated" or that Mr. Plaas took a hostile "tone" with Mr. Mourfield. Secondly, while Mr. Mourfield has arguably

---

[146] This is not meant to suggest that hostility based on union preference is acceptable, just that such activity is not covered by environmental whistleblower laws.

[147] The only evidence was Mr. Mourfield's testimony that Mr. Rogers and some other men had spread "propaganda" about him and called him a "union son of a bitch, union troublemaker." (TX, p. 444-46). Assuming the truth of these assertions, it is clear that they were based on Mr. Mourfield's union activity.

demonstrated he was a member of the protected class and suffered intentional retaliation from Mr. Rogers, the court does not agree that any such retaliation was "pervasive and regular," or detrimentally affected Mr. Mourfield.[148] Third, the court questions the true source of any such environment, feeling that it more likely stemmed from Mr. Mourfield's pro-union stance than any environmental concerns he may have had. Finally, the court questions the validity of the majority of the claimed instances of harassment since Mr. Mourfield failed to assist in the investigation by providing any of the evidence he claimed to have.

2. Alleged Firing: December 16, 1998

Mr. Mourfield alleged he was fired for insisting on seeing the OSHA investigator and refusing to return to work. (TX, pp. 330, 431-33). Mr. Smith's testimony vacillated between actually being fired and being threatened with being fired, although he did eventually state he felt he had been fired at that time. (TX, p. 41, 54, 60). Mr. Rogers continually denied firing the men, but admits so threatening them. (TX, p. 561, 595). However, at one point during his testimony, Mr. Heiskell admitted that the men had been fired that day, saying "that was the day – yes – they were fired". (TX, p. 704).

After consideration, the court is persuaded that Mr. Rogers probably did tell the men they were fired that day, regardless of his actual authority to do so. Therefore, this constitutes an adverse employment activity.

3. Lay off: December 23, 1998

There is no dispute that Mr. Mourfield was laid off December 23, 1998, although of course the true reason is greatly disputed. However, at this point in the analysis, the actual motive for the lay off is irrelevant. A termination, firing, or lay off is one of the clearest possible examples of an adverse employment activity.

4. Breaking off Negotiations: January, 1999

Mr. Mourfield alleges that Respondents broke off settlement negotiations and refused to rehire him after he retained counsel and "asserted his environmental whistleblower law rights." (See, e.g., Complainant's Opening Brief, p. 2; Complainant's Amended PFFCL number 28). Although Mr. Mourfield's retaining of counsel and mention of his environmental whistleblower rights was found not to be protected activity, the break-off of negotiations may be an adverse employment activity.

An employer's refusal to rehire a former employee may constitute adverse employment action. See Artrip v. Ebasco Services, Inc., 89-ERA-23 (Sec'y Mar. 21, 1995)(citing Ruggles v. California

[148] Mr. Mourfield frequently used the phrase "dog stares" to describe the "looks" he received from Mr. Rogers, and complained of hostile tones of voice. It is unclear how this treatment may have negatively affected him.

Polytechnic State Univ., 797 F.2d 782, 786 (9th Cir., 1986). In cases of failure to hire or rehire, in order to show that adverse employment action occurred, a complainant must establish that he was qualified for the position, applied for the position, the employer was otherwise obligated to consider him, and the employer hired another individual not protected by the Acts or the position remained vacant after the application was rejected. See Holtzclaw v. Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet, 95-CAA-7 (ARB Feb. 13, 1997).

In this case, Respondents were willing to rehire Mr. Mourfield, and in fact made several offers to do so; however, the parties were unwilling to reach agreement on other issues, such as a guarantee of a non-hostile work environment, the amount of back pay, and attorney fees. The court has been unable to find, and the parties have failed to present, any cases squarely addressing the question of whether the ending of general settlement negotiations is an adverse employment activity. However, the court's opinion is that it is probably not an adverse employment activity to break off negotiations, because the parties were under no obligation to start such negotiations. To take the question further, if it is adverse activity to break off negotiations, is it adverse employment activity to simply fail to ever reach an agreement? Would it be a violation to refuse to enter into negotiations in the first place? If an employer is required to engage in such negotiations indefinitely, should a complainant also be so required? However, since the court has no definite answers to these questions at present, it will assume, for the purposes of this case and the sake of argument, that Respondents' ending of negotiations was an adverse employment activity.

5. Blacklisting

Mr. Mourfield also asserts that Respondents listing him in personnel records as ineligible for rehire demonstrates that he was "secretly blacklisted, denounced and condemned ... as a 'union organizer' who disrupted the job site'.... making him ineligible for rehire." (Complainant's Opening Brief, p. 2; see also Complainant's Amended PFFCL 4, 18, 23). Mr. Mourfield also pointed out that despite this reference to the disruption he caused, he was never previously "written up" for any disruption at the Bimbo Cereal site.

The fact that a possibly blacklisted complainant was not refused employment or did not suffer any actual employment injury does not shield a respondent from liability. See Leveille v. New York Air National Guard, 94-TSC-3 and 4 (Sec'y Dec. 11, 1995). In Leveille, the blacklisting was simply marking an employee for avoidance in employment because she engaged in protected activity; the communication of an adverse recommendation simply was evidence of a decision to blacklist the employee. The Secretary stated that "[b]lacklisting is the quintessential discrimination, *i.e.*, distinguishing in the treatment of employees by marking them for avoidance." The Secretary indicated that he would follow his finding in Earwood v. Dart Container Corp., 93-STA-16 (Sec'y Dec. 7, 1994), that "effective enforcement of the Act requires a prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment opportunities as a result." A former supervisor's statement that he would not rehire a worker may be an instance of blacklisting. Webb v. Carolina Power & Light Co., 93-ERA-42 (Sec'y July 14, 1995), citing Beckett v. Prudential Ins. Co. of America, No. 94-CV-8305

(SAS), 1995 LEXIS 6513 (S.D. N.Y. May 15, 1995)("Poor recommendations ... may be discriminatory practices if done in direct retaliation for a former employee's opposition to an unlawful employment practice"); compare Smith v. Continental Ins. Corp., 747 F.Supp. 275, 281 (D. N.J. 1990), aff'd, 941 F.2d 1203 (3d Cir. 1991) (rejecting claim of blacklisting where plaintiff admitted she was unaware of any negative verbal or written job references to prospective employers).

In Odom v. Anchor Lithkemko 96-WPC-1 (ARB Oct. 10, 1997), the ARB found that Gaballa v. Atlantic Group, Inc., 94-ERA-9 (Sec'y Jan. 18, 1996), does not necessarily prohibit an employer from providing a negative reference once the employee has filed a retaliation claim. Rather, to be discriminatory, such a communication must be motivated at least in part by protected activity. The ARB noted that in Gaballa, the employer explicitly mentioned the employee's protected complaint of retaliation. It is unlawful discrimination when providing information concerning a complainant's employment to an outside party to refer to the complainant's complaint about discrimination. Discriminatory referencing violates the ERA regardless of the recipient of the information. See Earwood v. Dart Container Corp., 93-STA-16 (Sec'y Dec. 7, 1994); Gaballa v. The Atlantic Group, Inc., 94-ERA-9 (Sec'y Jan. 18, 1996).

There was testimony that two other companies contacted Respondents for references on Mr. Mourfield, and Mr. Heiskell testified that he said Mr. Mourfield was a "good hand" and a "good welder." Mr. Mourfield introduced no contrary evidence or testimony that he received poor references. Mr. Mourfield's only evidence of the effects of any blacklisting consisted of testimony that he has applied for many jobs, but has been unable to find consistent work as a welder. However no proof of these "hundreds" of applications was provided, and the court notes that Mr. Mourfield and his wife attempted to conceal his current employment.

The court is left with the fact that Respondents' personnel files listed Mr. Mourfield as ineligible for rehire, and none of the witnesses were able to say that this information was ever changed. Regardless of the fact that Respondents offered to rehire Mr. Mourfield during negotiations, and has introduced no real evidence to prove the results of blacklisting, under the cases cited above the fact that he was "marked for avoidance" by being marked "ineligible for rehire" is sufficient to evidence of blacklisting.[149] The court notes testimony from Respondents' witnesses that it is possible for an employee considered ineligible for rehire to rejoin the company; however, the court is not persuaded that this negates the presumption that an employee marked ineligible for rehire has been marked for avoidance.

D. Nexus

The final element of Mr. Mourfield's prima facie case is to demonstrate a reasonable "nexus," or to raise an inference that his protected activity motivated Respondents to take the adverse employment activities. The court found above that these activities included the "firing" of Mr.

[149] The motive, if any, for blacklisting will be discussed below. The present discussion only concerns whether any blacklisting occurred at all.

Mourfield and Mr. Smith on December, 16, 1998; Mr. Mourfield's lay off on December 23, 1998; the listing of Mr. Mourfield as ineligible for rehire; and the break off of negotiations in January 1999. The court also found above that the only instances of environmental protected activity

Respondents had knowledge of were the reports of leaking argon gas made to Mr. Rogers (sometime in November) and to the OSHA investigator (on December 16, 1998). The court must decide whether there is a nexus between these protected activities and the adverse activities.

Mr. Mourfield has focused much of his energy on demonstrating the animus Respondents allegedly feel against him. (See, e.g., Complainant's Amended PFFCL 5; Complainant's Opening Brief, pp. 1-2). While Respondents opinion of Mr. Mourfield certainly has relevance, what is more important is the reason for any such strong dislike. After listening to the testimony, reviewing the exhibits, and reviewing the various filings of the parties, it is clear to the court that neither party much likes the other. However, even if Respondents' dislike of Mr. Mourfield did culminate in a termination, if the reason for the underlying animosity was not environmental protected activity by Mr. Mourfield, his claims before this court must fail. This is the nature of the nexus requirement, as well as the shifting burdens of proof which follow the satisfaction of a prima facie case.

Mr. Mourfield's initial complaint of leaking argon gas was made in November 1998, soon after he started work; however, the facts of this incident and the delay before any of the possible adverse actions was taken leads the court to conclude Mr. Mourfield has failed to show a possible nexus between these events. Mr. Mourfield testified that Mr. Rogers questioned him about his excessive use of argon, but Mr. Mourfield demonstrated that the poor condition of the equipment was responsible. Mr. Mourfield also said Mr. Rogers did not seem angry and brought him tape to try to fix the leaks, but said there was nothing else he could do. (See TX, pp. 1034-36). Mr. Mourfield also testified that he and Mr. Rogers generally got along, at least until Mr. Mourfield's pro-union stance became public knowledge. (TX, p. 1054). As for the time lapse between the protected activity and the adverse employment activity, while the court acknowledges the many cases which found a temporal nexus still existed after much longer periods of time than one month, under the facts of this case, the court is not persuaded a nexus exists on that basis alone.

Mr. Mourfield's "firing" on December 16, 1998 occurred before he engaged in any protected activity that day; at the time of the incident with Mr. Rogers, Mr. Mourfield's own testimony reveals he had only insisted he be allowed to speak with the OSHA investigator, he had not stated any concerns other than a lack of HAZCOM training, and had not admitted that he had contacted OSHA. (See *supra*, Summary of the Evidence, Section III B). It would be impossible for any protected activity occurring later that day to have motivated Mr. Rogers to fire Mr. Mourfield and Mr. Smith.

However, the court is persuaded that Mr. Mourfield has satisfied the nexus requirement for his layoff of December 23, 1998. A single person layoff immediately raises suspicions, especially occurring only one week after Mr. Mourfield's protected activity (reporting of argon leaks) on December 16, 1998. In addition, Mr. Rogers' notes of December 16, 1998 raise suspicions that the

"economic" lay off was merely a way to get rid of Mr. Mourfield. (See EX-40, p. 3 (instruction to "lay off Mr. Mourfield and one other instead of firing him"); see also Complainant's Amended PFFCL 2, 2A, 12, 13, 19, 20)). Therefore, the court concludes that Mr. Mourfield has satisfied the

nexus requirement for his December 23, 1998 lay off, by demonstrating a likely cause was his whistleblowing activity of December 16, 1998. Since the marking of Mr. Mourfield as ineligible for rehire (blacklisting) grew out of his lay off on December 23, 1998, the court concludes Mr. Mourfield has satisfied the nexus requirement for this as well.

The court is also persuaded that Mr. Mourfield has satisfied the nexus requirement for the break off of settlement negotiations.[150] While the last possible protected activity occurred approximately one month before (December 16, 1998), and Mr. Mourfield was last employed by Plaas, Inc. approximately three weeks prior, the court agrees that the same underlying animus against him which may have led to the lay off and blacklisting of December 23, 1998, could have motivated Respondents' to break off settlement negotiations.

Therefore, the court concludes Mr. Mourfield has made a prima facie case that his environmental protected activity resulted in the lay off of December 23, 1998, his blacklisting in the Plaas, Inc. employment file (when he was marked ineligible for rehire), and the break off of settlement negotiations in January, 1999.

III. Legitimate Non-Discriminatory Reasons

Mr. Mourfield asserted Respondents can show no legitimate reason for his layoff (see, e.g. Complainant's Amended PFFCL 8-9); he also noted Respondents have not asserted his lay off was for any cause. (See, e.g. Complainant's Amended PFFCL 11). In contrast, Respondents presented evidence that the lay off was the culmination of a long-planned multi-person lay off (made partially unnecessary by voluntary quits), and that Mr. Mourfield's designation as ineligible for rehire was due primarily to his disruptive pro-union activity. (See *supra*, Summary of the Evidence, Sections I D and IV B).

A. December 16, 1998 "Firing"

Even though the court found Mr. Mourfield failed to make a prima facie case that this was motivated by protected activity, the court will briefly address what it believes to be the true reason for this "firing." Mr. Mourfield and Mr. Smith were threatened with termination for leaving their assigned work area, and for failing to follow an order to return there. Mr. Mourfield and Mr. Smith alleged they were told they had been fired, but they also agreed they had refused to return to work, and that Mr. Rogers never specifically said they could not meet the OSHA investigator that day.

---

[150] As discussed above, the court is not entirely convinced a break off of negotiations is an adverse employment activity, but has assumed so for the purposes of this discussion.

While the court agrees that every worker has a right to speak to OSHA, the court also agrees that employers have a right to know where there employees are, and to expect them to follow orders from supervisors. Thus, whether or not Mr. Rogers actually had the authority to fire the men or merely threatened them with this, the court is persuaded that he had a legitimate, non-discriminatory reason for his actions that day.

B. December 23, 1998 Layoff and Blacklisting

Respondents' witnesses testified at length that a seniority-based, economically necessary (but unwritten) lay off plan had been in place for some time, and that Mr. Mourfield's lay off on December 23, 1998 simply was the culmination of that plan. (See *supra*, Summary of the Evidence, Sections I D and IV B). The court finds the timesheets and other workers' dates of hiring and quitting also show that Mr. Mourfield was the most junior welder at the time of his lay off. (See generally, EX-1, EX-59; CX-16A, CX-16B). The court notes that the timesheets do not show any increase in the workload of the other men after Mr. Mourfield left (except for one week), suggesting there was a slow down in the amount of work on the site. (EX-59; CX-16A, CX-16B). Respondents explained that the lay off of Mr. Mourfield by himself resulted from the voluntary quits of other workers several days prior. (See, e.g. TX, p535, 539, 659, 676, 678). The court also notes that Respondents retained Mr. Smith, who accompanied Mr. Mourfield throughout the events of December 16, 1998 and was "fired" by Mr. Rogers along with Mr. Mourfield that day, suggesting that Respondents were not retaliating for the events of that day.[151]

The court also notes other possible reasons for the lay off, which were suggested by the evidence and testimony, but that Respondents were understandably reluctant to raise. As the court has tried to reiterate, its jurisdiction is limited to environmental whistleblower claims. Thus, even if Mr. Mourfield's lay off was illegal discrimination, if it resulted from Respondents anger over OSHA whistleblowing or union activity protected under the labor laws, this court does not have jurisdiction. The court is of the opinion that the primary source of any animus between Mr. Mourfield and Respondents resulted from his union activity, and to a lesser extent from his multiple safety concerns (which ultimately led him to contact OSHA). Understandably Respondents would be reluctant to defend a claim under one statute by admitting they had violated another, and the court has no authority to make any official finding under any other statutes. However, this does not change the court's conclusion that if there was any illegal motivation for Mr. Mourfield's lay off, it probably came from his union activity and his OSHA whistleblowing.

Mr. Mourfield also argued that Mr. Rogers notes (which state that he should be laid off with one other instead of firing him) demonstrate that he was not laid off for economic reasons. However,

---

[151] The various records also show that Mr. Smith was "senior" to Mr. Mourfield. (See, e.g., EX-1). Mr. Smith testified he voluntarily quit on January 9, 1999. (TX, p. 52).

after its own review of the transcript, the court is convinced that Mr. Plaas clearly explained what he had actually said, and how it was slightly altered in Mr. Rogers notes; Mr. Plaas was trying to avoid the appearance of unfairness, which he was afraid a one person layoff (the other planned layoffs had already quit) might create ("I told him it would be better if he could lay off Mr. Mourfield with somebody else because we would probably get some kind of a charge filed against us. That's exactly what I said."). (TX, p. 1024-25). The court also notes that nearly every witness found some fault with Mr. Rogers notes, reducing their probative value. Even assuming these notes were correct, they lend further support to the court's conclusion above that any illegal motive for the lay off was more likely anti-union feeling. Finally, the complete text of this note supports the court's conclusion that Respondents any illegal motivation of Respondents may have been primarily motivated by anti-union feelings: "Fred [Plaas] called [and] talk[ed] to Kevin [Heiskell] about the union. He said to lay off David [Mourfield] and one other instead of firing him." (EX-40, p. 3 (spelling errors corrected)).

Again the court is persuaded that any blacklisting was a result of Respondents' displeasure with Mr. Mourfield's pro-union activity, and not with any environmental protected activity. The termination forms themselves also support this conclusion: "at times disrupted job site (union organizer)." (CX-2B).

C. Negotiations

Respondents have also demonstrated legitimate non-discriminatory reasons for the break off of negotiations in January 1999. From the letters exchanged, it is clear that the parties had only a few major issues still in dispute at that time: attorney's fees, the exact amount of back pay, and Mr. Mourfield's insistence on a promise of a non-hostile working environment. Respondents also testified to an urgent need to hire another welder to help finish the Bimbo Cereal job, since Mr. Smith had quit on January 9, 1999. The court also feels that the break-off of negotiations is a legitimate negotiating tactic, especially when it seemed negotiations had stalled over the refusal to pay attorney fees.[152] Finally, as the statute of limitations was fast approaching, the court also suspects that Mr. Mourfield would not have continued negotiations for much longer before breaking them off himself.

Therefore, after reviewing the documents, the court is persuaded the most likely cause for the break off of negotiations was frustration at the inability to reach a settlement, combined with Respondents' pressing business need to rehire another welder.

---

[152] Mr. Plaas said several times that he refused to pay attorney fees because he had been told that OSHA Section 11 did not allow for such fees. The court suspects the confusion on this point stemmed from the difference between a settlement and an adjudication; while there may not be any provision in Section 11 which allows for the award of fees, that does not mean that the parties can not agree such fees in a settlement agreement worked out between them.

IV. Complainant's Rebuttal

As the court has found that Respondents' rebutted his prima facie case, the burden now returns to Mr. Mourfield to demonstrate that the reasons proffered by Respondents were not the true reasons for any adverse employment action.

Mr. Mourfield pointed out several inconsistencies with the economic, seniority-based layoff explanation offered by Respondents, particularly: the lack of documentation (no written lay off plan), Mr. Rogers notes (to "lay off David and one other"), and certain discrepancies in the record and exhibits regarding other workers.

As to the lack of documentation of the lay off plan, the court does not find this persuasive. Respondents testified that lay off plans are never reduced to writing, and said they were unaware of any other companies (except one) who did. (See, e.g. TX, pp. 640-42; p. 591; p. 158). Mr. Mourfield introduced only the testimony of a local union official, Mr. Don Green, who said he was only aware of a few companies using a strict seniority basis for lay offs. (TX, p. 922). Testimony that only a few companies use this system does not somehow invalidate Plaas, Inc.'s use of this system.

As to Mr. Rogers notes, particularly the one which says to 'lay off David and one other instead of firing,' agrees this is suspicious. However, neither Mr. Plaas nor Mr. Heiskell recalled this exchange, and both said they found certain entries in Mr. Rogers notes to be questionable. Mr. Mourfield also said there were other entries in Mr. Rogers notes that he disagreed with. Finally, Mr. Plaas explained this entry may stem from his reluctance to lay off a 'union organizer' by himself because of it might appear improper. The court is not persuaded that this document alone demonstrates that the proffered reason was illegitimate. In fact, if anything, it demonstrates that any illegal lay off of Mr. Mourfield was based on his union activity, not his environmental concerns.

As for discrepancies in the employment records, these are puzzling, but were mostly explained. For example, Mr. Mourfield suggested that Mr. Clampet was not rehired near the end of January as Respondents claim, relying on a timesheet with Mr. Clampet's name and a date of January 7, 1999. However, as the court found in its previous Order on Pending Motions, this was adequately explained by Respondents as simple clerical error: "1-7-99" was entered instead of "2-7-99." (See April 5, 2000 Order on Pending Motions, p. 6). In addition, the lay offs of Mr. Eppler and Mr. Dodderer, who were both hired before Mr. Mourfield yet laid off before he was, were explained to be the result of other causes. For example, Mr. Eppler left due to injury and a desire to return to his preferred physician (see TX, pp. 902-03), and Mr. Dodderer was laid off as a welder after he proved to be unable to meet the requirements of the job. (See TX, pp. 910-15).

Therefore, the court finds Mr. Mourfield has failed to disprove that the possible adverse employment actions he suffered were actually based on legitimate non-discriminatory reasons.

RECOMMENDED ORDER

It is therefore ORDERED that the complaint of Bruce David Mourfield II is hereby DISMISSED.

_____

RICHARD D. MILLS
Administrative Law Judge

RDM/bc

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).